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WILCOX & CO

No. 6160

United States Circuit Court of Appeals

For the Ninth Circuit.

JOHN ARTHUR BOYD,

Appellant,

vs.

FINCH R. ARCHER, Warden of the United States Penitentiary at McNeil Island, Washington,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6160

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

GARVIN, H. SYLVESTER, 955 Dexter Horton Bldg., Seattle, Washington,

JEFFERY, FRANK R., 955 Dexter Horton Bldg., Seattle, Washington,

Attorneys for Petitioner (Appellant).

SAVAGE, ANTHONY, United States District Attorney for the Western District of Washington, Seattle, Washington,

McCUTCHEON, JOHN T., Assistant United States District Attorney for the Western District of Washington, Tacoma, Washington,

MALLERY, JOSEPH A., Assistant United States District Attorney for the Western District of Washington, Tacoma, Washington,

Attorneys for Respondent (Appellee).

[1*]

In the United States District Court for the Western District of Washington, Southern Division.

No. 8140.

In the Matter of the Petition of JOHN ARTHUR BOYD for a Writ of Habeas Corpus.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

PETITION FOR WRIT OF HABEAS CORPUS.

To the District Court of the United States for the Western District of Washington, Southern Division.

Your petitioner, John Arthur Boyd, humbly petitioning the Court, shows:

That he is unjustly and unlawfully detained and imprisoned by one John Finch Archer, keeper or warden of the United States penitentiary at McNeil Island, Washington, and that your petitioner has been restrained of his liberty since the 15th day of March, 1929; that the cause or pretext of such detention is a certain order, sentence and judgment in cause No. 40,011 of this Honorable Court in the Northern Division thereof, a certified copy of said sentence and judgment, together with a certified copy of a certain sentence, judgment and commitment in cause No. 11,630 of this Honorable Court, together with the returns thereon, are attached to this petition and by reference are made a part hereof, together with a certain judgment and commitment in cause No. C.–10,145, entitled United States of America vs. J. A. Boyd, duly and regularly issued and properly certified from the United States District Court for the District of Oregon, which are also by reference made a part of this petition.

That the petitioner states and therefore alleges that by reason of the laws of the United States

this petitioner is entitled to a release of a part of his sentence by reason of his good behavior; that the full time contemplated and allowed by law has [2] fully expired and that by reason of the said laws of the United States this petitioner has served more than thirty days additional and is therefore entitled to his immediate discharge; this petitioner further states that he is advised by his counsel that he is not now detained in custody in the said United States penitentiary by virtue of any sentence or judgment and that he is therefore unlawfully detained by the said warden and also upon advice that by reason of having served the period of time as established by the certified copies of records attached hereto, that the sentence and judgment of the United States District Court for the Western District of Washington has been fully and completely satisfied and discharged and also that the said sentence in cause No. 40,011 is void and unlawful for uncertainty as more fully shown by the certified copies attached hereto and heretofore referred to in this petition.

WHEREFORE your petitioner prays that a writ of habeas corpus be issued by this Honorable Court directed to the said John Finch Archer, warden or keeper of the United States penitentiary as aforesaid, and that the matters and things herein contained be inquired of by this Honorable Court and further directing the said warden or keeper of the penitentiary to bring the body of your petitioner before this Honorable Court upon a day certain and that your petitioner may be discharged

from the said unlawful restraint and detention aforesaid.

JOHN ARTHUR BOYD,
Petitioner.

H. SYLVESTER GARVIN,
FRANK R. JEFFREY,
Attorneys for Petitioner,
955 Dexter Horton Building,
Seattle, Washington. [3]

State of Washington,
County of Pierce,—ss.

John Arthur Boyd, being first duly sworn, on oath says: That he is the person whose name is subscribed to the foregoing petition for a writ of habeas corpus and that he is familiar with the contents of said pleading and that the matters and things therein contained are true in substance and in fact.

JOHN ARTHUR BOYD.

Subscribed and sworn to before me this 16th day of April, 1930.

H. SYLVESTER GARVIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within petition this 18 day of April, 1930.

ANTHONY SAVAGE,
Attorney for Respondent. [4]

District Court of the United States, Western District of Washington, Northern Division.

No. 11,630.

UNITED STATES OF AMERICA

vs.

JOHN ARTHUR BOYD.

COMMITMENT.

The President of the United States of America, to the Marshal of the United States for the Western District of Washington, GREETING:

WHEREAS, at the November, 1927, term of said court, held at the courtroom of said court, at the City of Seattle, in said District, to wit, on the 27th day of February, 1928, the said defendant was convicted of the crime of Conspiracy to violate and violation of the National Prohibition Act and violation of Section 593a of Tariff Act of 1922 committed within the jurisdiction of said court, contrary to the form of the statutes of the United States in such case made and provided and against the peace and dignity of the United States;

AND, WHEREAS, on the 27th day of February, 1928, being a day in the said term of said court, the said defendant was, for said crime of which he was convicted as aforesaid, by the judgment of said court ordered to be imprisoned in the United States Penitentiary at McNeil Island, Washington, or in such other prison as may be hereafter provided for the confinement of persons

convicted of offenses against the laws of the United States, for the period of Fifteen Months at hard labor from and after this date, and to pay a fine of One Thousand Dollars, and that execution issue therefor, and that he be further imprisoned at the same place until he shall have paid said fine, or until he shall be discharged by law,—

NOW, THIS IS TO COMMAND YOU, THE SAID MARSHAL, to take [5] and keep and safely deliver the said defendant into the custody of the Keeper or Warden, or other officer in charge of said penitentiary or prison, forthwith.

AND THIS IS TO COMMAND YOU, the said Keeper and Warden and other officers in charge of the said penitentiary or other prison, to receive from the United States Marshal of said Western District of Washington the said defendant, convicted and sentenced as aforesaid, and him the said defendant safely keep until he shall be discharged by law.

WITNESS the Hon. JEREMIAH NETERER, Judge of the said District Court, and the seal thereof, at the City of Seattle, this 7th day of March, 1929.

[Seal] ED. M. LAKIN,
Clerk.
By S. Cook,
Deputy Clerk.

MARSHAL'S RETURN.

I hereby certify that I received the within Warrant of Commitment on the 7th day of March, 1929, and in obedience thereto on the 15th day of March, 1929, I did commit the within named defendant as herein requested.

E. B. BENN,
United States Marshal.
A. B. MILLER,
Deputy.

(Return filed Mar. 16, 1929.) [6]

In the United States District Court for the Western District of Washington, Northern Division.

No. 11,630.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN ARTHUR BOYD,
Defendant.

SENTENCE.

Comes now on this 27th day of February, 1928, the said defendant, John Arthur Boyd, into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and

he nothing says, save as he before hath said: WHEREFORE, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating Sec. 37, Penal Code, conspiracy to violate the Act of October 28, 1919, known as the National Prohibition Act, and Sec. 593 "A" of Tariff Act of 1922, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of fifteen (15) months at Hard Labor, and to pay a fine of $1,000.00. And the said defendant, John Arthur Boyd, is hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Commitment is stayed for two days to permit preparation of notice of appeal.

Recorded in Judgments and Decrees No. 5, at page 721. [7]

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Sentence and Commitment, in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and the seal of said court this 18th day of March, 1930.

[Seal] ED. M. LAKIN,
Clerk.
By S. M. H. Cook,
Deputy. [8]

MARSHAL'S RETURN ON COMMITMENT.

Cause No. 11,630.

UNITED STATES OF AMERICA

vs.

JOHN ARTHUR BOYD.

I hereby certify that I received the within Warrant of Commitment on the 7th day of March, 1929, and in obedience thereto on the 15th day of March, 1929, I did commit the within named defendant as herein requested.

E. B. BENN,
United States Marshal.
By A. B. MILLER,
Deputy.

MARSHAL'S RETURN ON COMMITMENT,

Cause No. 40,011.

UNITED STATES OF AMERICA

vs.

JOHN ARTHUR BOYD.

I hereby certify that I received the within Warrant of Commitment on the 15th day of March,

1929, and in obedience thereto on the 15th day of March, 1929, I did commit the within named defendant as herein requested.

ED. B. BENN,
United States Marshal.
By A. B. MILLER,
Deputy. [9]

In the United States District Court for the Western District of Washington, Northern Division.

No. 40,011.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN ARTHUR BOYD,
Defendant.

SENTENCE.

Comes now on this 15th day of March, 1929, the said defendant, John Arthur Boyd, into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says, save as he before hath said: WHEREFORE, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of conspiring to commit certain offenses against the United States and of

receiving, buying, and concealing certain intoxicating liquors, in violation of Section 37, Penal Code, conspiracy to violate the Act of October 28, 1919, known as the National Prohibition Act; and conspiring to violate the Act of September 21, 1922, known as the Tariff Act, and violation of Section 593 of the Tariff Act of 1922, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of fifteen (15) months at hard labor, said term of imprisonment to run consecutively and not concurrently with and in addition to the sentence heretofore imposed in a former cause. And the said defendant, John Arthur Boyd, is hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Recorded in Judgment and Decrees No. 6, at page 152. [10]

United States of America,
Western District of Washington.

I, Ed. M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Marshal's Returns on Commitments, and Sentence in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is

a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and the seal of said court this 15th day of April, 1930.

[Seal] ED. M. LAKIN,
Clerk.
By S. Cook,
Deputy. [11]

District Court of the United States, Western District of Washington, Northern Division.

No. 40,011.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN ARTHUR BOYD,
Defendant.

COMMITMENT.

The President of the United States of America, to the Marshal of the United States for the Western District of Washington, GREETING:

WHEREAS, at the November, 1928, term of said court, held at the courtroom of said court at the City of Seattle, in said District, to wit, on the 12th day of March, 1929, the said defendants was convicted of the crime of Violation, Sec. 37 P. C., Consp. to vio. Act of Oct. 28, 1919, known as Nat. Prohibition Act, and Consp. to violate Act of Sept. 21, 1922, known as the Tariff Act and vio. sec.

593 of Tariff Act of 1922, committed within the jurisdiction of said court, contrary to the form of the statutes of the United States in such case made and provided and against the peace and dignity of the United States;

AND WHEREAS, on the 15th day of March, 1929, being a day in the said term of said court, the said defendant was, for said crime of which he was convicted as aforesaid by the judgment of said court, ordered to be imprisoned in the United States Penitentiary at McNeil Island, Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period of Fifteen Months, to run consecutively with and in addition to sentence imposed in cause No. 11,630, at hard labor, from and after this date, or until he shall be discharged by law,— [12]

NOW, THIS IS TO COMMAND YOU, THE SAID MARSHAL, to take and keep and safely deliver the said defendant into the custody of the Keeper or Warden, or other officer in charge of said penitentiary or prison, forthwith.

AND THIS IS TO COMMAND YOU, the said Keeper and Warden and other officers in charge of the said penitentiary or other prison, to receive from the United States Marshal of said Western District of Washington the said defendant, convicted and sentenced as aforesaid, and him the said defendant safely keep until he shall be discharged by law.

WITNESS the Hon. J. STANLEY WEBSTER, Judge of the said District Court, and the seal thereof, at the City of Seattle, this 15th day of March, 1929.

[Seal] ED. M. LAKIN,
Clerk.
By S. Cook,
Deputy Clerk.

MARSHAL'S RETURN.

I hereby certify that I received the within Warrant of Commitment on the 15th day of March, 1929, and in obedience thereto on the 15th day of March, 1929, I did commit the within named defendant as herein requested.

E. B. BENN,
United States Marshal.
By A. B. MILLER,
Deputy.

(Return filed March 16, 1929.) [13]

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Sentence and Commitment in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and the seal of said court this 18th day of March, 1923.

ED. M. LAKIN,
Clerk.
By S. M. H. Cook,
Deputy. [14]

In the District Court of the United States, for the District of Oregon.

BE IT REMEMBERED, That on Monday, the 11th day of June, 1923, the same being the 82d judicial day of the Regular March Term of said court, the following proceedings, among others, were had before the Honorable ROBERT S. BEAN, United States District Judge for said District, to wit: [15]

In the District Court of the United States for the District of Oregon.

No. C.—10,145.

June 11, 1923.

THE UNITED STATES OF AMERICA
vs.
J. A. BOYD.

INDICTMENT.

Section 39 P. C.

Now at this day come the plaintiff by Mr. Allan Bynon, Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Frank J. Lonergan, of counsel.

Whereupon said defendant waives motion for a new trial herein, and thereupon, on motion of plaintiff for judgment in accordance with the verdict heretofore returned by the jury herein,—

IT IS ADJUDGED that said defendant be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term of two years, and that he stand committed until his sentence be performed or until he be discharged according to law. Whereupon, on motion of said defendant,

IT IS ORDERED that commitment herein be and the same is hereby *staid* for thirty days from this date. [16]

AND AFTERWARDS, to wit, on the 11th day of June, 1923, there was issued out of said court a commitment in words and figures, as follows, to wit: [17]

District Court of the United States, District of Oregon.

No. C.–10,145.

For Violation of Section 39 P. C.

UNITED STATES OF AMERICA

vs.

J. A. BOYD.

COMMITMENT.

The President of the United States of America, to the Marshal of the District of Oregon, or to His Deputy; to the Keeper of Either of the Jails

in Our Said District; to the Warden of the United States Petitentiary, McNeil Island, Wash., GREETING:

WHEREAS, at the March, 1923, term of the above-entitled court J. S. Boyd was duly convicted of the crime of Violation of Section 39 of the Penal Code of the United States, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America, for which offense he hath this day been sentenced by our said Court to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, or such other place of confinement as the Attorney General may designate, and to be there kept for the term of Two Years and to stand committed until this sentence be performed,—

NOW, THIS IS TO COMMAND YOU, the said Marshal or Deputy, to take and keep and safely deliver the said defendant J. A. Boyd into the custody of the Keeper or Warden in charge of said prison, forthwith.

AND THIS IS TO COMMAND YOU, the said Keeper or Warden in charge of the said prison, to receive from the said Marshal or Deputy the said defendant J. A. Boyd, convicted and sentenced as aforesaid and him keep and imprison in accordance with said sentence, or until he be otherwise discharged by law. Hereof fail not at your peril.

WITNESS the Honorable CHARLES E. WOLVERTON and the Honorable ROBERT S. BEAN, Judges of our said court, and the seal thereof affixed

[18] at Portland, in said District, this 11th day of June, 1923.

[Seal]

G. H. MARSH,
Clerk.
By E. M. Morton,
Deputy Clerk.

United States of America,
District of Oregon,—ss.

In obedience to the command of the within writ, I have this 26 day of July, 1923, committed to the Federal Prison at McNeil Island, Wash., the within named J. A. Boyd, by delivering him to the keeper thereof.

CLARENCE R. HOTCHKISS,
United States Marshal.
By FRANK SNOW,
Deputy. [19]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Judgment and Sentence, and Commitment, in cause No. C.–10,145, United States of America vs. J. A. Boyd, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 10th day of April, 1930.

G. H. MARSH,
Clerk.
By F. L. Buck,
Chief Deputy Clerk.

Petition and Attached Papers Indorsed: Filed in the United States District Court, Western District of Washington, Southern Division. Apr. 18, 1930. Ed. M. Lakin, Clerk. By E. Redmayne, Deputy. [20]

ORDER TO SHOW CAUSE.

Upon reading and considering the petition of John Arthur Boyd filed herein, petitioning this Court for an order granting a writ of habeas corpus, and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED that John Finch Archer, Warden of the United States Penitentiary at McNeil Island, Washington, is hereby directed in the court of the United States District Court for the Western District of Washington, Southern Division, at Tacoma, Washington, at the hour of 10 o'clock A. M. on the 26th day of April, 1930, to then and there show cause, if any there be in the premises, why a writ of habeas corpus should not issue in the above-entitled cause.

Done in chambers at Seattle this 18th day of April, 1930, at Seattle, Washington.

EDWARD E. CUSHMAN,
United States District Judge.

Received a copy of the within order this 18 day of April, 1930.

ANTHONY SAVAGE,
Attorney for Respondent.

[Indorsed]: Filed Apr. 18, 1930. [21]

DEMURRER.

Comes now Finch R. Archer, Warden of the United States Penitentiary at McNeil Island, Washington, by his attorneys, Anthony Savage and John T. McCutcheon, and demurs to the petition for a writ of habeas corpus filed in the above-entitled cause, upon the grounds and for the reason that the same does not state facts sufficient for the granting of the relief prayed for therein.

ANTHONY SAVAGE,
United States Attorney,
JOHN T. McCUTCHEON,
Assistant United States Attorney,
Attorneys for Finch R. Archer, Warden U. S. Penitentiary.

[Indorsed]: Filed Apr. 21, 1930. [22]

PETITIONER'S EXHIBIT No. 1.

In the United States District Court for the Western District of Washington, Northern Division.

No. 40,011.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ARTHUR BOYD,

Defendant.

CLERK'S MINUTES ON IMPOSITION OF JUDGMENT AND SENTENCE DATED MARCH 15, 1929.

Defendant in court for sentence, represented by John J. Sullivan; Anthony Savage appearing on behalf of the Govt. as counsel for Govt.

Counsel for Govt., counsel for deft., and Attorney Thos. P. Revelle make statements to Court, the Govt. requesting a consecutive sentence.

Sentence: McNeil Island Penitentiary fifteen (15) months, this sentence to be served consecutively with and in addition to the sentence heretofore imposed in former cause.

Filed and Adm. as Petr. Ex. 1.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the

foregoing copy with the original minutes of the Clerk on imposition of sentence in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and the seal of said Court this 18th day of April, 1930.

[Seal] ED. M. LAKIN,
Clerk.
By S. Cook,
Deputy. [23]

ORDER SUSTAINING DEMURRER AND DENYING PETITION FOR WRIT OF HABEAS CORPUS.

This matter having heretofore been argued and duly considered, it is hereby

ORDERED AND ADJUDGED that the said demurrer interposed by the United States of America be and the same is hereby sustained, and it is further ORDERED that the said petition for a writ of habeas corpus be and the same is hereby denied, to all of which said petitioner excepts and his exception is hereby allowed.

Done in open court this 12th day of May, 1930.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed May 12, 1930. [24]

NOTICE AND PETITION FOR APPEAL.

Comes now the petitioner and gives notice that he appeals to the Circuit Court of Appeals from the order of this Court sustaining the demurrer of the United States of America and denying the writ herein, and the said petitioner respectfully prays the Court that this appeal be allowed.

H. SYLVESTER GARVIN,
FRANK R. JEFFREY,
Attorneys for Petitioner.

Received a copy of the within notice and petition this 15 day of May, 1930.

ANTHONY SAVAGE,
Attorney for U. S.

[Indorsed]: Filed May 22, 1930. [25]

ORDER ALLOWING APPEAL.

Upon considering the notice and petition of the petitioner herein, and the Court being otherwise fully informed in the premises,—

IT IS ORDERED that upon giving a cost bond in the amount of $250 the appeal of the petitioner herein be and the same is hereby allowed and that the citation may issue.

Done at Seattle this 15th day of May, 1930.

EDWARD E. CUSHMAN,
Judge.

Received a copy of the within order this 15 day of May, 1930.

ANTHONY SAVAGE,
Attorney for U. S.

[Indorsed]: Filed May 22, 1930. [26]

CITATION ON APPEAL.

The President of the United States to Finch R. Archer, Warden of the United States Penitentiary at McNeil Island, Washington, and to His Attorneys, Anthony Savage, United States Attorney, and Joseph A. Mallery and John McCutcheon, Assistant United States Attorneys for the Western District of Washington, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's office in the above-entitled cause, and to show cause, if any there be, why the judgment and order mentioned in the said notice of appeal should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the above-entitled court, this 24th day of May, 1930.

EDWARD E. CUSHMAN,
District Judge.

Attest: ————————————,
Clerk of the District Court of the United States for the Western District of Washington.

Received a copy of the within citation on appeal this 15 day of May, 1930.

ANTHONY SAVAGE,
Attorney for U. S. [27]

ASSIGNMENTS OF ERROR.

Comes now the petitioner herein and in support of his petition herein for an appeal, submits that manifest errors were committed in that judgment of the court rendered on the 12th day of May, 1930, in the above-entitled cause in the following particulars:

1. That the Court erred in refusing to grant the writ of habeas corpus.

2. That the Court erred in holding that the facts stated in the said petition were insufficient to justify the issuance of the writ.

3. That the Court erred in sustaining the demurrer to said petition for writ of habeas corpus filed in the above-entitled cause.

4. That the Court erred in signing and entering the order herein sustaining the demurrer of the

United States of America to the petition for writ of habeas corpus herein, which order was heretofore signed and filed herein on May 12, 1930.

H. SYLVESTER GARVIN,
FRANK R. JEFFREY,
Attorneys for Petitioner.

Served May 10, 1930.

JOSEPH A. MALLERY,
Asst. U. S. Atty. [28]

[Indorsed]: Filed May 12, 1930. [29]

COST BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, John Arthur Boyd and The Fidelity and Casualty Company of New York, a corporation, organized and existing under the laws of the State of New York, and authorized to do a surety business in Washington, are held and firmly bound unto United States of America in the full and penal sum of Two Hundred Fifty and no/100 ($250.00) Dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, the said John Arthur Boyd binds himself, his heirs, executors, and administrators and the said company binds itself, its successors and assigns, jointly and severally, by these presents.

Signed, sealed and dated this 16th day of May, 1930.

The condition of this obligation is such, that WHEREAS, the above-named petitioner has appealed to the Circuit Court of Appeals for the 9th Judicial Circuit in the above-entitled court and action, and

WHEREAS, the above-named petitioner has heretofore given due and proper notice that he appeals from the said order of the said United States District Court,—

NOW, THEREFORE, if the said petitioner, John Arthur Boyd, shall pay to the United States of America, the appellee, all costs, if any there be, that may be awarded against said petitioner on the appeal or on the dismissal thereof not exceeding the sum of Two Hundred Fifty and no/100 ($250.-00) Dollars, then this obligation to be void; otherwise to remain in full force and effect.

JOHN ARTHUR BOYD,
By H. SYLVESTER GARVIN,
His Attorney-in-fact.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
[Seal] By HELEN GARRISON,
Attorney.

O. K.—TOM DeWOLFE,
Asst. U. S. Atty.

Approved.

EDWARD E. CUSHMAN,
Judge. [30]

State of Washington,
County of King,—ss.

On this 19th day of May, 1930, before me personally appeared Helen Garrison, of Seattle, Washington, to me known to be the true and lawful attorney-in-fact of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that she was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] GEO. M. CRAWFORD,
Notary Public in and for the State of Washington,
Residing at Seattle.

State of Washington,
County of King,—ss.

On this day personally appeared before me H. Sylvester Garvin, attorney-in-fact for John Arthur Boyd, to me known to be the individual described in and who executed the within and foregoing instrument and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 16th day of May, 1930.

[Seal] JOHN C. BOWEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed May 21, 1930. [31]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Comes now the appellant and respectfully requests that the Clerk prepare a transcript of the following papers on appeal:

1. Petition for the writ of habeas corpus, together with all exhibits attached thereto.
2. Order to show cause issued in the above-entitled cause on the 18th day of April, 1930.
3. Demurrer of the United States of America to said petition for writ of habeas corpus herein.
4. The certified copy of the Clerk's journal entry made and entered in cause No. 40,011 in the records of the United States District Court for the Western District of Washington, Northern Division, on the 15th day of March, 1929, and offered and admitted as an exhibit in support of the petition herein.
5. The order sustaining the demurrer and denying the writ of habeas corpus entered in this cause.
6. Notice of appeal, petition for appeal, order allowing appeal, and citation on appeal.

7. Assignments of error.
8. Cost bond.

H. SYLVESTER GARVIN,
FRANK R. JEFFREY,
Attorneys for Appellant. [32]

[Indorsed]: Filed May 22, 1930. [33]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered from one to thirty-four, inclusive, constitute a full, true and correct copy and transcript of the record and proceedings in the case of In the Matter of the Application of John Arthur Boyd for a Writ of Habeas Corpus in Cause No. 8140 in said District Court, as required by praecipe of counsel filed and shown herein, and as the same remain of record and on file in the office of said District Court.

I further certify that I hereto attach and transmit the original citation in said cause with acceptance of service thereon.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred and paid in my office on behalf

of petitioner, the appellant herein, for making the record, certificate and return to the United *States Court* of Appeals in the within entitled cause, to wit:

Clerk's Fees (Act Feb. 11, 1925), for making record, certificate and return, 46 fols. @ 15¢ ea..... $6.90

Appeal..... 5.00

Seal..... .50

Attest my hand and the seal of said District Court at Tacoma, in said District, this 29th day of May, A. D. 1930.

[Seal] ED. M. LAKIN,
Clerk.
Alice Huggins,
Deputy. [34]

[Endorsed]: No. 6160. United States Circuit Court of Appeals for the Ninth Circuit. John Arthur Boyd, Appellant, vs. Finch R. Archer, Warden of the United States Penitentiary at McNeil Island, Washington, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed June 4, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 6160

JOHN ARTHUR BOYD, Petitioner,

Appellant,

vs.

FINCH R. ARCHER, Warden of the United States Penitentiary at McNeil Island, Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge.*

Brief of Appellant

H. SYLVESTER GARVIN,
FRANK R. JEFFREY,
Attorneys for Appellant.

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Seattle, Wash.

MARTIN & DICKSON, PRINTERS

TABLE OF CASES

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 6160

JOHN ARTHUR BOYD, Petitioner,

Appellant,

vs.

FINCH R. ARCHER, Warden of the United States Penitentiary at McNeil Island, Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge.*

Brief of Appellant

STATEMENT OF FACTS

This is an appeal from an order of the United States District Court for the Western District of Washington, Southern Division, denying the petition of appellant for a writ of habeas corpus, who prayed to be discharged from custody and imprisonment under two sentences and commitments rendered

at different terms by separate courts, numbered respectively cause No. 11630 and cause No. 40011. Appellant contends that both sentences have been served.

In cause No. 11630 the appellant was sentenced on the 27th day of February, 1928, for violating Section 37 of the Penal Code, conspiracy to violate the Act of October 28, 1919, and Section 593 "A" of the Tariff Act of 1922, by Judge Bourquin in the District Court of the United States, Western District of Washington, Northern Division, to serve a term of fifteen months at hard labor in the United States Penitentiary at McNeil Island and to pay a fine of $1000.00. From this judgment and sentence an appeal was prosecuted to the Circuit Court of Appeals for the Ninth Circuit and affirmed.

In cause No. 40011 appellant, on the 15th day of March, 1929, entered a plea of guilty to violation of Section 37 of the Penal Code, conspiracy to violate the National Prohibition Act and Section 593 "A" of the Tariff Act of 1922, before Judge Webster in the District Court of the United States, Western District of Washington, Northern Division. On the same day the court sentenced appellant to be imprisoned

> "in the United States Penitentiary at McNeil Island, Pierce County, Washington, for the term of fifteen months at hard labor, said terms of im-

> prisonment to run consecutively and not concurrently with and in addition to the sentence heretofore imposed in a former cause."

On the 15th day of March, 1929, defendant was duly committed to the penitentiary on a commitment issued in cause No. 11630 and a commitment issued in cause No. 40011. *Both commitments were irregular.* The commitment in cause No. 11630 enlarged the sentence to this extent. The clerk added the following words to the said commitment:

> "and that he be further imprisoned in the same place until he shall have paid said fine or until he shall be discharged by law."

In cause No. 40011 the clerk did not correctly recite the sentence of the court in the said commitment. In fact he went much farther and attempted to make the sentence definite and certain by inserting the following language:

> "to run consecutively with and in addition to sentence imposed in cause No. 11630."

That by virtue of the provisions of Section 5544 Revised Statutes, a prisoner under sentence is entitled to a deduction on a sentence of fifteen months which would leave him a period of twelve months and one day to serve. The appellant has served considerably more than this period of time.

We contend that appellant has served both sentences. Our contention is based upon either one of two possible constructions of the two respective sentences and commitments. In our first contention, for the sake of argument, we will assume that the sentence and commitment in cause No. 11630 is correct but that the sentence rendered in cause No. 40011 by reason of the vague, uncertain, indefinite and unspecific words used, not stating any order of sequence, can only be construed as a sentence running concurrently with the sentence in cause No. 11630.

It is a well settled principal of law in criminal cases that where the court intends a sentence to be cumulative he must so state in words so specific that no confusion will appear. Keeping in mind the wording of this sentence

> "consecutively and not concurrently with and in addition to the sentence heretofore imposed in a former cause."

we call this court's attention to the following cases:

> "If the order in which the terms of imprisonment for the different offenses is to be served, is not clearly designated the terms are to be served concurrently, and the defendant cannot be held in further confinement under the sentence after the expiration of the longest term imposed. Cumulative sentences are permissible and in some cases are appropriate but when imposed on different

counts or indictments there must be certainty of the order of sequence."

Howard v. United States, 75 Fed. 986.

The logical reasoning in the following case is extremely applicable; *United States v. Patterson,* 29 Fed. 755:

> "The court do order and adjudge the prisoner, Oscar L. Baldwin, be confined at hard labor in the state's prison of the state of New Jersey, for the term of five years upon each of the three indictments above named, said terms not to run concurrently, and from and after the expiration of said terms until the costs of this prosecution shall have been paid."

Judge Bradley, in his very learned opinion, discussed and commented on the uncertainty of the sentence in this case in the following words:

> "The judgment of the district and circuit courts in criminal cases are final * * * and a mere error of law if in fact committed is irremediable; as much so as are the decisions of the Supreme Court. But if a judgment, or any part thereof, is void either because the Court that renders it is not competent to do so * * * (or) because it is senseless and without meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on habeas corpus."
>
> "If the prisoner is to be detained in prison for three successive terms neither he, nor the keeper of the prison, nor any other person, knows,

or can possible know, under which indictment he has passed his first term, or under which he will have to pass the second or the third. If, for any reason peculiar to either of said indictments, as for example, some newly-discovered evidence, should be a different face put upon the case, so as to induce the executive to grant the prisoner a pardon of the sentence on that indictment, no person would affirm which of the three terms of imprisonment was condoned. If a formal record of any one of the indictments, and the judgment rendered thereon, were, for any reason, required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell whether it was the sentence for the first, the second, or the last term of imprisonment. * * * But the addition that they were not to run concurrently, without specifying the order in which they were to run, is uncertain, and incapable of application. It seems to me that the additional words must be regarded as void.

The words used are undoubtedly equivalent to the words, "the said terms shall follow each other successively." But, if these words had been used, the case would not have been different. The inherent vice of being insensible and incapable of application to the respective terms, without specifying the order of their succession, would still exist. The joint sentence is equivalent to three sentences, one on each indictment. One of them is applicable to the indictment for misapplication of funds; but, if they are successive, which one? That which is first to be executed, or that which is secondly or thirdly to be executed? No intelligence is sufficient to answer the question. A prisoner is entitled to know under what sen-

tence he is imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, and as insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered."

This doctrine is well established in the Ninth Circuit in the following case:

Pucinelli v. United States, 5 Fed. 2nd, 6:

"Where sentences are imposed on verdicts of guilty or pleas of guilty on several indictments or on several counts in the same indictment, in the same court, each sentence begins to run at once and all run concurrently in the absence of some definite, specific provision that the sentence shall run consecutively, specifying the order of sequence."

See also *In Re Breton,* 93 Me. 30, 44 Atl. 125, 74 *A. L. R.,* 335; *In Re Hunt,* 28 Tex. App. 361, 13 S. W. 145.

In *Daugherty v. United States,* 2 Fed. (2nd), 691, the defendant was charged on three counts in one indictment with sale of narcotics. He plead guilty to all three counts and sentenced as follows:

"Be confined in the U. S. Penitentiary situated at Leavenworth, Kansas, for the term of five years on each of said three counts and until he shall have been discharged from said penitentiary by due course of law. Said term or imprisonment to run consecutively and not concurrently."

On petition for writ of habeas corpus the court had this to say:

> "Where sentence is imposed on verdicts of guilty or pleas of guilty, on several counts or on several indictments consolidated for trial, it is the rule that the sentences so imposed run concurrently, in the absence of specific and definite provision that they be made to run consecutively by specifying the order of sequence."

However, this case was reversed in *United States v. Daugherty,* 269 U. S. 360, 70 L. Ed. 309. In this the Supreme Court, having reviewed the case and affirming the decision of the Circuit Court of Appeals down to the point of cumulative or concurrent sentences, thereupon says:

> "But we think it (C. C. A.) erred in holding that the sentence was only for 5 years.
>
> Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehension by those who must execute them. The elimination of every possible doubt cannot be demanded. Tested by this standard the judgment here questioned was sufficient to impose total imprisonment for fifteen years, made of three five-year terms, one under the first count, one under the second, and one under the third, to be served consecutively and to follow each other in the same sequence as the counts appear in the indictment. This is the reasonable and natural implication from the whole entry. The words "said term of imprisonment to run consecutively and not concurrently" are not consistent with the five-year sentence."

It must be remembered that this appellant was not tried on two counts of one indictment but was charged in two indictments by different grand juries and sentenced at separate terms of court by different judges.

It will be noted further in the opinion in the *Daugherty* case, supra, that the Supreme Court recognizes that cardinal rule established in the *Patterson* case supra, and approves it in the following language:

> "*United States v. Patterson,* supra, grew out of a sentence to pleas of guilty to three separate indictments. A single judgment entry directed that the prisoner 'be confined at hard labor in the state's prison of the state of New Jersey for a term of five years upon each of the three indictments above named, said terms not to run concurrently, and from and after the expiration of said terms until the costs of this prosecution shall have been paid.' The question there was materially different from the one here presented (*Daugherty* case) which concerns counts in one indictment. We think the reasoning in that opinion is not applicable to the present situation. *Neely v. United States,* Fourth C. C. A., 2 Fed. 2nd, 849, is more in point."

In the instant case we admit that it may have been the intention of the court to pronounce a sentence that might run consecutively with some other sentence but at this point we wish to call the court's attention to the fact that this appellant had previously been convicted in Oregon of an offense in the Federal Court

for which he had served a term of imprisonment in McNeil Island Penitentiary. We ask if the words

> "in addition to the sentence heretofore imposed in a former cause"

answer the requirements of the rule of certainty and sequence as laid down by the long line of decisions in criminal cases? We think not, for after a critical analysis of the language under discussion, no other conclusion seems possible than that it is uncertain, indefinite, unspecific and vague and only leads to the propounding of another question, namely, to what sentence and to what former cause does the court refer and which sentence is it to follow. In *Rice v. United States,* 7 Fed. 2nd, 319, the court pointed out that the word "consecutively" must be applied to something definite.

The fact that the clerk attempted in his commitment to erase from the warden's mind any confusion which might arise by reason of the wording of the said sentence does not help the situation in the least. A commitment should do nothing more or less than recite the sentence of the court. Indeed a certified copy of the sentence has been held to be sufficient authority for a warden to imprison and hold a person.

> "A certified copy of the sentence of a court of record is sufficient authority for the detention of a convict. No warrant or mittimus is necessary."
>
> *In re*: *Wilson,* 18 Fed. 33; 29 L. Ed. 89.

Suppose the clerk had in his commitment recited the words of the court

> "in addition to the sentence heretofore imposed in a former cause"

then we ask what construction could the warden have possibly made other than to construe the sentence to run concurrently with the commitment imposed in No. 11630, especially in view of the fact that the appellant was committed on the same day, to-wit: March 15, 1929, on the two commitments and further in view of the language of the commitment in No. 40011 which reads:

> "from and after this date."

In our second contention we will assume that the sentence and commitment in cause No. 40011 are sufficient in law but that the sentence imposed thereunder has been served for this reason: the commitment in cause No. 11630 is null and void and the same as if it had never been issued, by reason of the fact that it is not the sentence of the court. The clerk has enlarged the sentence of the court in his commitment by adding the words:

"and that he be further imprisoned in the same place until he shall have paid said fine or until he shall be discharged by law."

If these words are stricken from the commitment the defendant would have only fifteen months to serve, but if they are allowed to remain he must either pay the fine or be imprisoned sixteen months. If the court had intended that he be imprisoned until the fine was paid it is to be presumed that he would have embodied an order to that effect in his sentence.

"Where a fine is imposed the court may or may not imprison until the fine is paid; but, if it does imprison, the form of the sentence should be that the defendant be imprisoned until the fine is paid, or until he be otherwise discharged by due process of law, in view of this section."

Further quoting from the same opinion:

"Section 1041 authorizes imprisonment until the fine or penalty imposed be paid, and under that statute it is discretionary with the court whether or not it will order the defendants into custody until the same is paid."

Wagner v. United States, 3 Fed. 2nd, 864.

"Sufficiency—In General. The commitment not only should be authorized by the judgment of conviction on which it is based, but should be in accord therewith. However, a mittimus need not be any more minute or precise than the record of the judgment. If the conviction and commitment substantially agree with the judgment it

is sufficient. A commitment which is defective in matter of substance is void; * * * Where a commitment shows on its face that the conviction is invalid for duplicity and uncertainty it is void.

16 *Corpus Juris,* page 1329, Section 3122.

The warrant or order of commitment is simply an authority and direction to the marshal to take the prisoner to the penitentiary named. The copy furnished by the marshal or clerk to the warden is merely evidence, and evidence only, of the judgment and sentence of the court and the mittimus issued thereunder. The statute makes this evidence of a regular court judgment and mittimus sufficient authority and protection to the warden, and the warden is not required to go beyond this copy in satisfying himself of the existence of a valid sentence against the prisoner. This is the purpose and effect of the copy, and nothing more. The prisoner is not committed by virtue of the copy, but by virtue of the judgment of the court, and the mittimus issued pursuant thereto; the real valid authority under which the mittimus is issued being the sentence of the court."

Howard v. U. S., 75 Fed. 986.

In conclusion we respectfully submit under the first proposition which we have discussed no other interpretation is possible of the language contained in the sentence in cause No. 40011 than that the said sentence should be construed to run concurrently with the sentence imposed in cause No. 11630 or that it should run from the date the appellant was commit-

ted to the penitentiary, or, under the second proposition, that by reason of the fact that the commitment in cause No. 11630 is absolutely void because of a substantial variance with the sentence imposed in the same cause, that no other conclusion can be arrived at in view of the premises other than that the appellant should be discharged immediately from further imprisonment on the sentences imposed. We respectfully request the consideration of the court of the questions herein discussed to the end that justice be done the appellant.

Respectfully submitted,

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Seattle, Wash.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6160

JOHN ARTHUR BOYD,

Appellant,

vs.

FINCH R. ARCHER, Warden of the United States Penitentiary at McNeil Island, Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLEE

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310 Federal Building, Seattle, Washington.

In the

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant Boyd was sentenced in the United States District Court for the Western District of Washington in Cause No. 11630 on the 27th day of February, 1928, for conspiracy to violate the Prohibition Act, to a term of fifteen months in the United States Penitentiary at McNeil Island, and to pay a fine of $1,000. (Tr. 7-8) In pursuance of said judgment and sentence a commitment was issued (Tr. 5) in said Cause No. 11630 in which commitment we find a provision to the effect that the defendant be imprisoned until his fine is paid or until he be discharged according to law. (Tr. 6) The last provision mentioned in the commitment is not to be found in the sentence. The United States Marshal for the Western District of Washington filed his return on said commitment, certifying that he received the same on the 7th day of March, 1929, and that in obedience thereto, and on the 15th day of March, 1929, he committed the defendant Boyd as requested and directed in said commitment. (Tr. 7)

In Cause No. 40011, in the United States District Court for the Western District of Washington, Northern Division, defendant Boyd was, on the 15th day of

March, 1929, sentenced to serve a term in the penitentiary at McNeil Island of fifteen months for conspiracy to violate the Tariff Act and the National Prohibition Act, with the further provision in said sentence in Cause No. 40011 as follows:

> "Said term of imprisonment to run consecutively with and not concurrently with, and in addition to the sentence heretofore imposed in a former cause." (Tr. 10)

Pursuant to said judgment and sentence a commitment was issued directing the Marshal to deliver the body of defendant Boyd to the warden at McNeil Island Penitentiary pursuant to the aforesaid judgment and sentence in Cause No. 40011, and we find in said commitment the following pertinent provision which was not included in the judgment and sentence:

> "or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period of fifteen months, to run consecutively with and in addition to sentence imposed in Cause No. 11630, at hard labor, from and after this date." (Tr. 13)

The Marshal's return of service on said commitment in Cause No. 40011, wherein he certifies that in obedience to said commitment he delivered Boyd to the penitentiary at McNeil Island on the 15th day of

March, 1929, will be found on page 14 of the transcript herein.

In 1923 in the United States District Court for the District of Oregon one J. A. Boyd, upon a plea of guilty to a charge of violation of Section 39 of the Criminal Code, was sentenced to the United States Penitentiary at McNeil Island for a term of two years. (Tr. 15-16) The commitment in pursuance of the sentence of the United States District Court for the District of Oregon will be found on page 17 of the transcript herein, and the Marshal's certification of the fact that he delivered J. A. Boyd to the Federal prison at McNeil Island on July 26, 1923, in conformity with with said commitment, as aforesaid, will be found on page 18 of the transcript herein.

John Arthur Boyd, petitioner and appellant herein, filed his petition for a writ of habeas corpus (Tr. 2), contending that the sentence in Cause No. 40011, as aforementioned (Tr. 10-11), was void and unlawful for uncertainty, as more fully shown by the certified copies of the judgment and sentence in said cause which were attached to the petition for the writ.

It is further alleged in said petition that Boyd had served the full time required of him by law to sat-

isfy the sentences in Cause No. 40011 and Cause No. 11630, and that he is entitled to release of a part of his sentence by reason of his good behavior, and that by reason of the laws of the United States petitioner Boyd, appellant herein, has served more than thirty days additional, and is, therefore, entitled to his immediate discharge from the United States Penitentiary at McNeil Island where he is now incarcerated by virtue of commitments issued pursuant to judgments in the criminal causes aforesaid. Certified copies of the sentences, commitments and Marshal's return on commitments in the two cases in the Western District of Washington, and in the case in which the appelant was sentenced in 1923 in the United States District Court for the District of Oregon, are attached to appellant's petition for writ of habeas corpus and made a part thereof. (Tr. 5-18, incl.)

Pursuant to the petition the lower Court entered an Order to Show Cause (Tr. 19) directing the appellee herein to appear before it and show cause why the writ should not issue as prayed for by the appellant. Appellee appeared on the required date and demurred to the petition of the appellant upon the ground and for the reason that the same failed to state facts suf-

ficient for the granting of the relief prayed for therein. (Tr. 20) The appellee's demurrer was sustained, and the appellant, refusing to plead further, his petition was denied and an exception noted in his behalf. (Tr. 22)

It is from the order sustaining appellee's demurrer to appellant's petition for a writ of habeas corpus, and denying the petition for the same, that the appellant is now prosecuting this appeal.

ARGUMENT

The sole issue to be determined, it would seem, is whether or not the sentence in Cause No. 40011 (Tr. 10-11) is indefinite and uncertain as to its requirement that the period of time mentioned therein run consecutively with and in addition to the sentence theretofore imposed in a former cause, and is, therefore, because of said uncertainty and indefiniteness, null and void.

It is contended by the appellant that the sentence in said cause is void due to the fact that it does not specify with sufficient particularity the former cause and period of time with which the sentence in Cause No. 40011 is to run consecutively and not concurrently, and is further null and void due to the fact that the sentence in Cause No. 40011 does not specify with sufficient definiteness or particularity the logical sequence or order in which the sentences in Cause No. 40011 and Cause No. 11630 are to be served.

It is also contended by the appellant that inasmuch as the commitment in Cause No. 11630 provides for the imprisonment of the defendant Boyd until his

fine is paid, or until he is discharged by law, when the sentence upon which said commitment is predicated does not so provide, that the entire sentence in Cause No. 11630 is void.

THE SENTENCE IN THE SECOND CASE (No. 40011) IS SUFFICIENTLY DEFINITE AND PARTICULAR AS TO REQUIRE SENTENCES TO RUN CONSECUTIVELY.

It is the contention of the Government that the commitment in Cause No. 40011 (Tr. 13) must be construed along with the sentence in said cause. (Tr. 10)

It will be noticed that the commitment shows that the defendant was to be imprisoned for the period of fifteen months, to run consecutively with and in addition to the sentence imposed in Cause No. 11630, while the sentence on which said commitment is based does not describe the number of the case with which the sentence in Cause No. 40011 is to run consecutively and not concurrently.

However, it is the contention of the Government that the commitment in Cause No. 40011 should be construed together with the judgment and sentence,

and an interpretation of the judgment and the commitment construed together lead to the unavoidable conclusion that it was the intention of the Court below, in Cause No. 40011, to require the defendant Boyd to serve fifteen months at the expiration of the penitentiary sentence meted out in Cause No. 11630, and that the sentence in the second case (No. 40011) was to run consecutively and not concurrently with the sentence in the first case and was to be, in fact, in addition thereto. The Marshal's return on the commitments in the first and second cases (Tr. 10, 14) shows that the defendant, appellant herein, in pursuance of said commitments, was delivered to the keeper of the United States Penitentiary at McNeil Island on the same day, to-wit, March 15, 1929.

In *Ex Parte Lamar*, 274 Fed. 160, it was held by Circuit Judge Manton, that where a sentence was somewhat ambiguous as to whether certain terms of imprisonment were to be served consecutively or concurrently with a prior sentence, that resort might be had to the commitment issued pursuant to the sentence, in order to explain away the ambiguity. On page 172 of the Court's opinion it was stated:

"After conviction on the conspiracy charge, the petitioner was returned to the Atlanta penitentiary, where he served out the balance of his term under the conviction for impersonating a federal officer. It is contended by him that, while so doing, he served the term which was imposed upon him on the conviction of the conspiracy charge. The argument is that the term of one year as his sentence on the conspiracy charge ran concurrently with the term imposed on the charge of the crime for impersonating a federal officer. There are two records which disclose what took place at the time sentence was imposed: First, the criminal minutes kept by the clerk in his minute book and the commitment paper which issued and upon which the prisoner was incarcerated. The criminal minutes kept by the clerk provide a memorial for the future record for the court of what took place at the time of sentence. The commitment serves another purpose. The purpose and object of this record is, first, to record accurately the judge's terms of the sentence; second, to advise the prisoner what penalty is imposed so that he might make amends to society accordingly; and, third, to advise the jailor so that he might keep the prisoner and require the fulfillment of the sentence so imposed."

Further in said opinion, on page 176, the Court said as follows:

"Is the sentence which was imposed by Judge Cushman definite and certain? Is it such as a defendant may readily understand and be capable of performing? I think all that is found in the commitment paper must be read and

applied. Servitude in the United States penitentiary at Atlanta did not answer the requirement to serve one year in Mercer county jail in New Jersey. The petitioner could not serve the term fixed for Mercer county jail until after he finished his term at Atlanta, Ga. The criminal minutes bear out the indorsement at the bottom of the commitment paper. It is there clearly expressed that the judge fixed the commencement of service after the expiration of Lamar's term at Atlanta. No authority supports the claim that Judge Cushman was prohibited from fixing the date of the commencement of this term to such future date. To hold otherwise would be making a mockery of the law, and to stultify the course of justice."

The decision in the *Lamar* case, supra, would seem to be authority for the Government's contention that the pleadings in a case, and in some instances extraneous evidence, may be resorted to to aid in construing a judgment in a criminal case.

To the same effect see *Fredericks vs. Snook*, 8 Fed. (2d) 966.

The language of the sentence should be given its ordinary legal meaning and should be construed so as to give effect to the intention of the judge who imposed it if possible. *Fredericks vs. Snook*, supra.

So construed, it is clear that it was the intention of the Court below in the second case (No. 40011) to

impose a term of imprisonment to run consecutively and not concurrently with the term of imprisonment meted out in the first case (No. 11630).

In *Rice vs. U. S.*, 7 Fed. 319, (9th C. C. A.) it was held that sentences on two counts, to run consecutively, imposed successive and not concurrent sentences. In the *Rice* case the defendant was sentenced to imprisonment for six months on the first count and six months on the second count, "said judgments to run consecutively." This Court held, in the *Rice* case, that it is well settled that a defendant convicted of more than one violation of Federal law may be sentenced to two or more terms of imprisonment, these terms to follow each other.

Speaking of the case of *Puccinelli vs. U. S.*, 5 Fed. (2d) 6, (9th C. C. A.), cited by appellant herein, this Court, in its opinion in the *Rice* case, stated as follows:

> "In his opinion in that case Judge Rudkin said:
>
> > " 'Where sentences are imposed on verdicts of guilty or pleas of guilty on several indictments, or on several counts of the same indictment, in the same court, each sentence begins to run at once and all run concurrently, in the absence of some definite, specific provision that the sentences shall

> run consecutively, specifying the order of sequence.' This is a correct statement of the law, but the sentences imposed on appellant were passed separately, and we think it sufficiently appears that they were to be served consecutively in the order in which the sentences were passed.

The present proceedings being a collateral attack on the judgment of a court of general jurisdiction, and raising highly technical questions, the doctrine announced in the reported cases cited by the appellant herein should not be extended. *Rice vs. U. S.*, supra.

In *Alvarado vs. U. S.*, 9 Fed. (2d) 385, (9th C. C. A.) it was contended by the appellant that the sentence was jurisdictionally defective. The sentence was in the following form:

> "Ordered that defendant, Paul Alvarado, for offense of which he stands convicted, as to counts 1 and 2 be imprisoned for period of three years and pay a fine in sum of $1,000, and as to counts 3 and 4 to be imprisoned for period of three years and pay a fine in sum of $1,000, said judgments of imprisonment to run consecutively."

This Court, however, approved the judgment and affirmed the same, stating that the sentence therein was in substantially the same form as approved by this Court in *Rice vs. U. S.*, supra.

In *U. S. vs. Daugherty*, 269 U. S. 360, the judgment and sentence was in the following form:

> "It is by the court considered and adjudged that said defendant is guilty of the crime aforesaid, and that as punishment therefor said defendant be confined in the United States Penitentiary situated at Leavenworth, Kansas, for the term of five (5) years on each of said three counts and until he shall have been discharged from said Penitentiary by due course of law. Said term of imprisonment to run consecutively and not concurrently."

It was contended by the defendant that the sentence was for five years only, and that the order in fenses was to be served was not clearly designated. The was to be served was not clearly designated. The terms were, according to his contention to be served concurrently, and the defendant could not, he contended, be held in further confinement under the sentence after the expiration of the longest term imposed. But the Supreme Court of the United States in overruling defendant Daugherty's contention stated as follows in its opinion:

> "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded. Tested by

this standard the judgment here questioned was sufficient to impose total imprisonment for fifteen years made up of three five-year terms, one under the first count, one under the second and one under the third, to be served consecutively and to follow each other in the same sequence as the counts appeared in the indictment. This is the reasonable and natural implication from the whole entry. The words, 'said term of imprisonment to run consecutively and not concurrently,' are not consistent with a five-year sentence."

In *Austin vs. U. S.*, 19 Fed. (2d) 127, (9 C. C. A.) it was shown that the lower court imposed upon the appellant imprisonment in the United States Penitentiary on each of two counts for the term of four years, "sentences to begin to run upon the expiration of the sentence now being served by the defendant." It was contended that the sentence was erroneous in that the trial court had no authority to suspend or postpone the operation of a sentence for a definite or indefinite period of time, but had authority only to impose a sentence to operate from the date of the arrival of the accused at the penitentiary, or from the date of judgment.

This Court in the *Austin* case said:

"In the present case, the judgment providing that imprisonment should begin at the

expiration of a sentence that precedes it, accords with recognized practice, and it cannot be said to be void for uncertainty since it is as certain as the nature of the matter will permit. 16 C. J. 1306; *Howard vs. U. S.*, 75 Fed. 986."

In *U. S. vs. Carpenter*, 151 Fed. 214, (9th C. C. A.), the petitioner plead guilty in the lower court and was sentenced upon the first three counts

> "to be imprisoned at hard labor for the term of two years for the offense charged in the first count of the indictment, and for a further term of two years thereafter for the offense charged in the second count of said indictment, and for the further term of two years thereafter for the offense charged in the third count of said indictment, and that he be committed until his sentence be performed, or until he be discharged according to law."

It was held that even though the sentence for the second or middle term is void, that the defendant was not for that reason entitled to be discharged at the expiration of the first term, but in such case the sentence on the third term begins at once on the expiration of the first. In its opinion the Court said:

> "But we are of the opinion that the court below erred in discharging the petitioner. Conceding that the sentence upon the second count was void, the imprisonment under the third count

should begin immediately upon the expiration of the sentence imposed upon the first. *Kite vs. Commonwealth*, 11 Metc. (Mass.) 581, 585; *Ex parte Jackson*, 96 Mo. 116, 119, 8 S. W. 800. In the case last cited the court said:

" 'The only point, therefore, left for discussion, is this: Whether the prisoner, having been sentenced at the same term of court to three successive terms of imprisonment in the penitentiary, having reversed the judgment and sentence of imprisonment pronounced against him as to the second or middle term, and served out his sentence as to the first term, is entitled to be discharged from serving out his third or last term. To this point the response must be in the negative, and for these reasons: The judgment upon which the prisoner's second term of imprisonment was dependent having been reversed, the case stands here precisely as if he had served out his second term or had been pardoned as to the offense for which that sentence was imposed, and so his third term of sentence lawfully began upon the expiration of his first term.'

"That the sentence on the third count was lawfully imposed there can be no doubt. That count charged the alteration of a money order with intention to defraud the United States. It is true that the time when the alteration is charged to have been made is the same date on which the money order described in the first count was alleged to have been altered; but it is none the less a separate and distinct forgery punishable under

a separate indictment. 'Although several drafts may be uttered as one indivisible act, the forgery of each is a separate offense.' 19 Cyc. 1411; *Barton vs. State*, 23 Wis. 587.

"There can be no doubt that the United States District Court for the District of Oregon intended to impose cumulative sentences upon the petitioner. We discover no fatal defect in the language of the sentence, rendering it uncertain when the term of imprisonment on the third count shall begin; but, if there were such a defect, we are of the opinion that it would have been the duty of the court below to have afforded the court which imposed the sentence an opportunity to correct the same before discharging the petitioner upon a writ of habeas corpus. *Ex parte Peeke* (D.C.) 144 Fed. 1016, and cases there cited."

Furthermore, Judge Webster, when sentencing defendant Boyd in the court below, could take no judicial cognizance of the sentence in Oregon. (Tr. 15-16) He could, however, when imposing the sentence in the second cause (No. 40011), take judicial cognizance of the former sentence of his court, to-wit, the sentence in the first case (No. 11630).

Furthermore, assuming for the purpose of argument, that the court below had before him the question of whether or not the sentence in Cause No. 40011 should run consecutively or concurrently with the sentence of the United States District Court for Oregon,

it must be assumed by this court that the sentences in the first and second cases only, No. 11630 and No. 40011, were the only ones under consideration by the court below, inasmuch as the record shows that the sentence in the Oregon case has been fully satisfied. (Tr. 18)

It will be conceded by the Government, in view of the decision of this Court in *Wagner vs. U. S.*, 3 Fed. (2d) 864, (9th C.C.A.) and considering that the Court in Cause No. 11630 has failed to provide that the defendant should stand committed until his fine is paid, he may not as a poor convict be imprisoned for the period of thirty days as a result of the imposition of said fine, but the sole remedy of the government for the collection of the same is by civil execution. However, it may be admitted by the government that when Boyd, the appellant herein, has served his entire sentence of 30 months, or when the same has been decreased by good time allowances, he is entitled to a writ of habeas corpus to obviate the necessity of his serving the thirty days required of a poor convict, who is sentenced to stand committed until his fine is paid. Inasmuch as any such provision is absent from the judgment imposed in Cause No. 11630, as above stated, it may be ad-

mitted, in view of the *Wagner case*, that the Government's only remedy is by civil process for the collection of the fine. However, this purported or alleged defect in the commitment in Cause No. 11630 (Tr. 5-6) does not nullify or invalidate the entire judgment and sentence in that cause as alleged, but only that portion of the same which is erroneous, to-wit, the provision in the commitment that the defendant shall stand committed until his fine is paid.

It is elementary that where a Federal Court exceeds its authority in the imposition of a sentence in excess of what the law permits, where the Court has jurisdiction of the person and the offense, the imposition of the same does not render the authorized portion of the sentence or commitment void, but only that portion of the commitment or sentence which is in excess.

Dodge vs. U. S., 258 Fed. 300,
Carter vs. Snook, 28 Fed. (2d) 609,
U. S. vs. Holtz, 293 Fed. 1019,
U. S vs. Peeke, 153 Fed. 166.

In view of all the foregoing, it is respectfully submitted that the trial court did not err when it sustained appellee's demurrer to the appellant's petition for a writ of habeas corpus; and, further, that the

court below was not in error when, upon sustaining said demurrer, and the appellant proceeding no further, it denied the petition for a writ of habeas corpus filed by the appellant.

Respectfully submitted,

ANTHONY SAVAGE,
United States Attorney,

TOM DeWOLFE,
Assistant United States Attorney.

No. 6161

In the United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of
GEORGE E. REED,
Alleged Bankrupt.

GEORGE E. REED, Bankrupt-Appellant,

vs.

GILBERT L. THORNTON, et al,
Petitioning Creditors-Appellees.

Appellees' Brief

On appeal from decree adjudicating Geo. E. Reed a bankrupt and entered in United States District Court for the District of Oregon.

S. J. BISCHOFF,
Attorney for Appellees.
OREN R. RICHARDS,
Attorney for Appellant.

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INDEX

POINTS AND AUTHORITIES

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STATEMENT OF FACTS

On and prior to May 31, 1929, the alleged bankrupt was engaged in the building business in the City of Portland. He had erected several large apartment houses shortly prior to that date and became heavily indebted. On May 21, 1929, he organized a corporation by the name of Portland Building & Investment

Company (Creditors' Exhibit 5), the incorporators being the alleged bankrupt, Grace H. Reed, his wife, George W. Bednar and Thomas A. Lovelace, both carpenters working for the alleged bankrupt, and H. F. Hokamp, a personal friend of Reed who was a real estate broker and who negotiated the purchase of some of the lots on which the apartment buildings were built. The capital stock of the corporation was fifyt thousand (50,000) shares of the par value of Ten Dollars ($10.00) per share; 25,710 shares were issued at the time of the incorporation, as follows:

George E. Reed	25,100	shares
Grace H. Reed	10	"
H. F. Hokamp	50	"
Thomas A. Lovelace	300	"
George W. Bednar	200	"
Oren R. Richards (Bnkpts. atty.)	50	"
Total	25,710	"

Reed nominally paid for his shares by conveying to the corporation at that time real estate consisting of three large apartment houses (Creditors' Exhibit 4). These three apartment buildings were conveyed to the corporation on May 31, 1929, and the deeds were recorded June 6, 1929. (Petitioning Creditors' Exhibits 32, 33 and 34).

These three deeds, although made to the corporation, were all endorsed for return to George E. Reed

and were returned to him after they were recorded.

One of these apartment houses, to-wit, located on Lots 7 and 8, Block 22, Hawthorne's First Addition to the City of Portland, was thereafter conveyed to Oren R. Richards, Bankrupt's attorney. The date of the conveyance appears to be September 1, 1929, although the original deed, which is in evidence, shows erasures both of the date of execution and the date of acknowledgment.

This particular property, while not the most valuable of the three, represented the most valuable asset for the reason that it was at the time of the conveyance clear of all incumbrance except the first mortgage; whereas the other two apartment houses, in addition to having first mortgages, were each incumbered with mechanic's liens in excess of $20,000.00.

The consideration which Richards claims to have paid for this apartment house was a conveyance of a piece of land having an assessed valuation of $1,000.00, rough, hilly and the timber on it is of no commercial value. (Petitioning Credits' Exhibit 39, Certificate of County Assessor of Curry County). Oren Richards, who received this conveyance, is the attorney for the bankrupt, was the attorney who organized the corporation for the bankrupt, had charge of all of the matters resulting in the formation of the corporation and the subsequent transfers, and was familiar

with the condition of Reed's affairs.

Another of the three apartment houses was conveyed by the corporation to Mary I. Lovelace (Petitioning Creditors' Exhibit 29), the mother of Thomas A. Lovelace, carpenter in the employ of the alleged bankrupt. This property was a very large apartment house on land 100x100, with a three-story apartment house containing about twenty-five apartments. The alleged consideration for this transfer was a conveyance of a piece of land in Clackamas County, Oregon, containing 14 acres, which had an assessed valuation of $1,040.00, and was conveyed to the corporation by Mary I. Lovelace, subject to a life estate therein.

On July 20th the alleged bankrupt conveyed to Luby Hargrove the real property known as Lot 25, Block 1, Flander's Park Addition in the City of Portland. This property was the residence of the bankrupt, was built by the bankrupt himself, was used and occupied by him and his family from the time it was built, and they continued to occupy the same after the alleged conveyance to Hargrove, and were in possession and occupation of the property at the time of the hearing before the special master. There had never been any change of possession. The consideration alleged to have been paid for this conveyance was the sum of $250.00, claimed to have been paid over in cash. No checks were produced and no evi-

dence in corroboration of the alleged payment of $250.00 cash was produced.

The deed to Hargrove was recorded by Reed himself and returned to Reed after it was recorded. After the deed was returned Reed's address was erased from the endorsement but the photostatic copy in the County Clerk's office shows Reed's address on the back of the deed. **The erasure from the original deed was made after the deed was returned and the erasure was obviously made for the purpose of eliminating the evidence of the return of the deed to Reed.**

On July 20, 1929, the allgeed bankrupt conveyed to Thomas A. Lovelace Lot 1, Block 11, Granville Park, within the corporate limits of the City of Portland. The grantee was a carpenter in the employ of the alleged bankrupt, and the son of Mary I. Lovelace. The alleged consideration for this conveyance was likewise a payment of $300.00 in cash, but no corroborative evidence of the cash payment was introduced. This cash payment was made notwithstanding the claim of Thomas A. Lovelace that the alleg.ed bankrupt was indebted to him in a large sum of money, something in the neighborhood of $2,000.00 or $3,000.00. This deed was likewise recorded by George E. Reed and returned to him.

On July 20, 1929, the alleged bankrupt conveyed to George H. Bednar real property known as the

West 26 feet of Lot Numbered 11, in Block Numbered 9, Holliday Park Addition, in the City of Portland, for an alleged cash consideration of $300.00. No corroborative evidence of the payment of this money was offered. Bednar is a young man who is a carpenter in the employ of George E. Reed, and lives with Mrs. Lovelace. This deed was likewise recorded by and returned to the alleged bankrupt.

All of these conveyances were made within a period of four months preceding the filing of the involuntary petition in bankruptcy. **The earliest conveyance was made May 31, 1929, and the involuntary petition in bankruptcy was filed September 29, 1929.**

The alleged bankrupt testified that the corporation was organized to take over the apartment properties (Page 4 of Reed's Testimony in Statement of Evidence).

> "The assets were turned over to form the capital stock of the corporation. Bednar and Lovelace have been in my employ as carpenters for several years. Bednar lives with Mrs. Lovelace, who is the mother of Thomas A. Lovelace."

He further testified:

> "The property described (meaning the conveyance of the six parcels of real property referred to above) **accounts for all the property I had any interest in in May at the time the corporation was**

organized. The home at 75 East 45th Street was deeded to Luby Hargrove, a real estate broker. I bought a Buick automobile about 1928 for $950.00. It has all been paid off. I transferred title to the automobile to Thomas A. Lovelace. I sold it to him for $60.00 July 20th, two days after the action was brought against me.

Q. You have the automobile in your possession.

A. I have, you bet.

Q. You have had it ever since you sold it, have you not?

A. Yes, part of the time.

Q. Have you had it all the time?

A. Yes, I have.

Q. Did you have any property left after you deeded parcels away that we have described?

A. No, that is all we had. After I sold that property, that was all we had.

I paid for all of the expenses incident to the formation of the corporation Portland Building & Investment Company. I engaged Oren Richards to organize the corporation. Of the six deeds I personally took three of them to the county Clerk's office to be recorded, and possibly I took the others. On the back of the deeds notations were made that they were to be returned to me. The clerk made the notation. I gave him the

address. The deeds were returned to me. I did not erase the address from the back of the deeds."

He further testified that he sold the stock issued to him, one-third of it to Thomas A. Lovelace for $250.00 in cash, one-third to Mary I. Lovelace for $200.00, and one-third to Mrs. McLane for $250.00. In other words he disposed of 25,100 shares of stock for $700.00, which stock was represented to have a value of $251,000.00. (See petitioning Credits' Exhibit 4, Subscription to Capital Stock), and which represented practically the entire value of all of the property conveyed to the corporation. He did not deposit the money in the bank, although he had a bank account. He was the president of the corporation from the time of its organization to the time of the bankruptcy proceedings. **He remained the president notwithstanding the fact that he had disposed of all of the stock except two shares.**

He further testified:

He was then questioned regarding his books of account and he testified as follows:

"As an officer of the corporation and President of it **I transferred the building at 31st and Burnside to my lawyer, Mr. Richards. * * * I was responsible for the sale of it. * * ***

"I never saw the piece of timber land Mr.

Richards traded for the property. I never saw a cruise of it. Mr. Richard's brother told me the assessed valuation was around $2,000.00."

* * * * * *

(Referring to the building which was deeded to Mr. Richards) he said:

"It was the only building that was free of liens."

"Q. Where are the books of account that had to do with the operations in the construction of these three aparment houses?

A. I have not got any books.

Q. Where are they?

A. I have not got any at all.

Q. Where are they?

A. I burned them.

Q. When?

A. At the time I formed that corporation or shortly afterwards.

Q. Have you any of the bills?

A. I have nothing. I burned them. I burned everything pertaining to the accounts up to the time this corporation was formed, check books, everything. At the time I burned the books liens were being filed against the buildings. I was a party to these lien notices. They were for debts incurred in the construction of the buildings."

Mr. Richards testified that the timber claim which he deeded to the corporation for the apartment house had never been cruised and didn't know whether the Portland Building & Investment Company made any investigation. He gave no statement as to how much timber was on the land and they didn't inquire.

After the apartment houses were transferred to the corporation and later transferred to Richards and one to Mary I. Lovelace, Thomas A. Lovelace nominally kept the books and records of the corporation and had charge of the receipts and expenditures, but it appeared very clearly that that was a subterfuge purely. The bank account was carried in the name of Thomas A. Lovelace, but the record of the bank account shows that it was used primarily for George E. Reed. Checks were issued out of that account direct to Reed, but instead of entering Reed's name, young Lovelace attempted to disguse the entry by inserting initials and reversing them. That is to say, that instead of writing "G. E. R." he made entries on the stub record "R. E. G.," but finally admitted that he referred to George E. Reed. This account also shows that notwithstanding Reed's claim that the residence had been sold to Hargrove, Lovelace was paying out of the corporation account interest and other charges in connection with this residence. It also discloses that young Lovelace was paying out of the corporation account operation bills on the property which had been deeded to Mary I. Lovelace. In other words,

this one account which was carried by Thomas A. Lovelace for the corporation was in reality being used as a makeshift to conceal Reed's personal operations.

In fact Mrs. Reed admitted in a letter which she wrote to Mrs. Lucius (Petitioning Creditors' Exhibit 14) that the Reeds were the owners of the building:

> "We have our apartments practically 100% full."

This was written after the alleged transfer.

Reference to the following items in Creditors' Exhibit 25 clearly shows that the account was kept by Lovelace for Reed.

In this account the apartment houses are referred to by name. The Laurel Manor is the building that had been conveyed to Richards, Reed's attorney.

The Regal Manor is the one that remained in the name of the corporation.

The Castle Manor is the one conveyed to Mary I. Lovelace.

The court will notice a large number of checks issued to R. E. G. These are all to Reed personally out of the corporation account.

On November 9th, item No. 89, there is a check

to City Mortgage Company for $165.00. This represented interest on the mortgage on the Reed residence, paid out of the corporation funds, notwithstanding the fact that it was supposed to belong and was conveyed to Luby Hargrove.

All of the Halsey Street items cover the building which had been conveyed to Mary I. Lovelace, and she was supposed to be the owner of it. Nevertheless, disbursements are made on account of that building from this so-called corporation account carried on by Thomas A. Lovelace.

These are but a few of the items in the account indicating that this account was in reality being carried by Lovelace for the benefit of George E. Reed, who was the acutal owner of the various properties.

The special master, to whom the court referred the issues raised by the involuntary petition, intervening petitions, and the answers thereto, made findings of fact and conclusions of law. He found as a fact that Reed was insolvent; that each of the petitioning creditors and intervening creditors had provable claims which in the aggregate exceeded $500.00; that the alleged bankrupt, within four months preceding the date of the involuntary petition, committed an act of bankruptcy in that he conveyed, transferred, concealed and removed, and permitted to be concealed and removed, with intent to hinder, delay and defraud

his creditors, the various properties referred to therein, being the six parcels of real property specifically described. (Finding of Fact No. 8.)

In Finding No. 9, he finds as a fact that every conveyance was made without any consideration, pursuant to a scheme or device to alienate the property and place the same beyond the reach of creditors; that he was indebted to a large number of creditors for labor and material in a sum in excess of $25,000.00 and was liable to the Commercial Casualty Company on an indemnity agreement signed when the surety company issued its bond on behalf of the bankrupt; that the corporation, Portland Building & Investment Company, was in truth and in fact the alter ego of George E. Reed; that Reed caused the corporation to convey the real property at 31st and Burnside Streets to Oren Richards, his attorney; that notwithstanding the conveyances Reed is in active possession and control of the various properties and that the transferees are acting as agents for the bankrupt.

He further finds as a fact that the alleged bankrupt has failed to establish any of the allegations of his affirmative answer.

In Finding No. 13, he specifically finds that in those instances in which the petitioning creditors were assignees that the assignments were taken in good faith and not for any unlawful or oppressive purpose;

that there was no collusion, but all proceedings were taken in a bona fide effort to prevent the perpetration of fraud on the part of the alleged bankrupt and for the purpose of recovering for the benefit of the creditors the property which had been fraudulently conveyed, to insure an equitable distribution of Reed's assets among all his creditors. Upon these findings of fact he recommended that an order of adjudication be entered.

The alleged bankrupt filed exceptions to the special master's report, which were heard by Honorable Robert S. Bean, District Judge, who overruled the exceptions and confirmed the special master's report and entered an order of adjudication from which this appeal is taken.

POINTS AND AUTHORITIES

Motion to Dismiss Appeal

THE APPEAL SHOULD BE DISMISSED FOR THE REASON THAT THE TRANSCRIPT AND RECORD WERE NOT FILED IN THE APPELLATE COURT AND THE CAUSE WAS NOT DOCKETED BY OR BEFORE THE RETURN DAY OF THE CITATION AS REQUIRED BY RULE XVI OF THE RULES OF THIS COURT, NOR HAS ANY ORDER BEEN ENTERED PRIOR TO THE EXPIRATION OF THE TIME

ENLARGING THE TIME WITHIN WHICH TO DO SO.

Rule XVI, Circuit Court of Appeals, Ninth Circuit.

Point I.

APPELLANT IS PRECLUDED FROM QUESTIONING THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDINGS OF FACT FOR THE REASON THAT HE HAS NOT BROUGHT TO THIS COURT ALL OF THE EVIDENCE INTRODUCED IN SUPPORT OF THE PETITIONER'S CASE.

Collier v. U. S., 173 U. S. 79.

Point II.

THERE ARE NO INTERVENING CREDITORS WHO BECAME SUCH BY ASSIGNMENT OF CLAIMS SUBSEQUENT TO THE FILING OF PETITION.

Levins v. Stark, 57 Ore. 189.
In re Miner, 117 Fed. 953, (Dist. Ct. of Ore.)
In re Miner, 114 Fed. 998, (Dist. Ct. of Ore.)

Point III.

THERE ARE NO PREFERRED CREDITORS AMONG THE ORIGINAL PETITIONERS OR

INTERVENORS.

11 U. S. C. A. 6107c, formerly § 67c Bky. Act.
In re Automatic Typewriter Co., 271 Fed. 1 (2nd Cir.).

Point IV.

A CREDITOR HOLDING AN UNLIQUIDATED CLAIM IS QUALIFIED TO ACT AS A PETITIONING CREDITOR, AND IT IS NOT NECESSARY THAT THE CLAIM SHOULD FIRST BE LIQUIDATED.

Grant Shoe Co. v. Laird Co., 212 U. S. 445.
Spear v. Gordon, 12 Fed. (2nd) 778, (1st Cir.).
In re Post, 12 Fed. (2nd) 941.

Point V.

PAYMENT TO PETITIONING CREDITORS SUBSEQUENT TO FILING OF THE INVOLUNTARY PETITION WILL NOT DISQUALIFY SUCH CREDITORS AND WILL NOT PRECLUDE AN ADJUDICATION IN BANKRUPTCY.

11 U. S. C. A., § 95g, formerly Section 59-g Bankruptcy Act.
11 U. S. C. A. § 94, formerly Section 58, Bankruptcy Act.
Ward v. Lowery, 295 Fed. 60 (5th Cir.).

In re Beddingfield, 96 Fed. 190 (U. S. D. C., Ga.).

In re San Jose Baking Co., 232 Fed. 200, (U. S. D. C., Northern District of California).

Point VI.

GENERAL ORDER NO. 5 DOES NOT PRECLUDE ASSIGNEES THORNTON AND CONLEY FROM BEING PETITIONING CREDITORS IN THIS CASE.

General Order No. 5.

Haviland v. Johnson, 70 Ore. 85.

French & Co. v. Haltenhoff, 73 Ore. 247.

Collins v. Heckart, 127 Ore. 43.

Levins v. Stark, 57 Ore. 189.

Hackett Digger v. Carlson, 127 Ore. 386.

11 U. S. C. A. § 53, formerly Section 30, Bankrupty Act.

Meek v. Centre Banking Co., 268 U. S. 426.

In re City Contracting & Bldg. Co., 30 A. B. R. 133.

Lowenstein v. McShane, 130 Fed. 1007.

Reports of American Bar Ass'n. 1925, p. 492.

11 U. S. C. A. § 95(b), formerly Section 59 (b), Bankruptcy Act.

11 U. S. C. A. § (9), formerly Section 1 (9), Bankruptcy Act.

11 U. C. C. A. § 1 (11), formerly Section 1 (11), Bankruptcy Act.

In re Bevins, 165 Fed. 434, (C. C. A., 2nd Cir.).

Re Page Motor Car Co., 251 Fed. 318.

In re Veller, 249 Fed. 633, (C. C. A., 6th Cir.)
Re Halsey El. Gen. Co., 163 Fed. 118.
Re Hanyan, 180 Fed. 498, affirmed 181 Fed. 1021.
Leighton v. Kennedy, 129 Fed. 737, (C. C. A., 1st Cir.).
In re Automatic Typewriter Co., 271 Fed. 1, (C. C. A., 2nd Cir.).

ARGUMENT

MOTION TO DISMISS APPEAL

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The citation was issued March 5, 1930, and was returnable within thirty days thereafter. Hence the time within which to file the record and transcript expired on April 5, 1930. No order extending the time was entered in the United States District Court or in

the Court of Appeals at any time. The transcript was filed and the cause docketed on June 6, 1930, two months after the time had expired, and under Rule XVI of this court the appeal should be dismissed.

Point I.

APPELLANT IS PRECLUDED FROM QUESTIONING THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDINGS OF FACT FOR THE REASON THAT HE HAS NOT BROUGHT TO THIS COURT ALL OF THE EVIDENCE INTRODUCED IN SUPPORT OF THE PETITIONER'S CASE.

On page 14 of appellant's brief he challenges the sufficiency of the evidence in the following manner:

> "NO EVIDENCE OF ANY KIND TO SUSTAIN FINDINGS 11, 12, 13, 14, 15, 16, 17, 18 and 25.
>
> "Nothing to discuss. No evidence."

We are at a loss to know what this has reference to. The findings of fact of the special master contain fourteen numbered paragraphs. There are no findings of fact 15, 16, 17, 18 and 25. In any event, appellant is precluded from questioning the sufficiency of the evidence for the reason that the record before this court does not include all of the evidence introduced

upon the hearing in support of the petition. The narrative statement of the evidence is fragmentary. The original transcript of the evidence contains 270 pages of typewritten record which together with the large volume of exhibits consisting of many books and records in addition to those referred to in the transcript before the court, dealt with questions of fact presented by the petition and answered thereto.

The court below did not certify the statement of the evidence to be a statement of all of the evidence introduced upon the trial of the issues. The brief excerpts of testimony presented to this court are sufficient only insofar as they present the questions of law that were passed upon in the court below. In the absence of a complete statement of all of the evidence we understand the rule to be that this court cannot and will not pass upon the question as to the sufficiency of the evidence to support the findings of fact.

Collier v. U. S., 173 U. S. 79.

Part II.

THERE ARE NO INTERVENING CREDITORS WHO BECAME SUCH BY ASSIGNMENT OF CLAIMS SUBSEQUENT TO THE FILING OF PETITION.

The only intervening creditors in this case are

Cress & Company and Commercial Casualty Insurance Company. Neither of these creditors are assignees. They are both original owners of their own claims. It is claimed that Thornton, assignee of W. W. Lucius, obtained an assignment of the claim after the filing of the original petition, but the record clearly establishes the facts to be to the contrary. The special master, in Finding No. 5, finds that the assignment of the claim from Lucius to Thornton was prior to the filing of the original petition in bankruptcy. The record also clearly establishes, and it is admitted by the alleged bankrupt that Thornton as assignee sued on this very claim in the state court before the petition in bankruptcy was filed. The record clearly establishes that Lucius assigned his claim to Thornton by oral assignment prior to July 16, 1929, for on that date Thornton, as assignee, commenced the action in the state court. The petition in bankruptcy was not filed until September 29, 1929. The written assignment was made on October 31, 1929, but was made "to confirm the oral assignment of the above described claim made by me to Mr. Thornton on or about the first day of July 1, 1929." (See Exhibit "A" attached to amended involuntary petition, affidavit of Gilbert L. Thornton, and affidavit of W. W. Lucius attached to amended involuntary petition.)

Under the law of the State of Oregon an oral assignment of a chose in action is valid and enforcible.

Levins v. Stark, 57 Ore. 189.

In re Miner, 117 Fed. 953, (District Court of Oregon), Judge Bellinger held:

> "The form of assignment of a claim is immaterial, and the proof of claim need only be such as will estop the assignor from making the same claim."

In re Miner, 114 Fed. 998, Judge Bellinger held proof of an assignment need not be in any particular form, that it **may be oral,** and that a subsequent written certificate may be evidence of an assignment.

In this case both the assignor and assignee admit on the record that the assignment was made prior to the filing of the petition in bankruptcy, and it is confirmed by the record fact that an action on the assigned claim was actually brought by Thornton almost four months prior to the filing of the involuntary petition in bankruptcy, hence Thornton did not become a creditor by assignment subsequent to the filing of the involuntary petition.

Point III.

THERE ARE NO PREFERRED CREDITORS AMONG THE ORIGINAL PETITIONERS OR INTERVENORS.

It is contended that Thornton is a preferred creditor because he instituted an action against the alleged bankrupt in the state court, as assignee of W. W. Lucius, and in said action attached property of the alleged bankrupt, and that this attachment was within the four months preceding the filing of the involuntary petition.

Thornton became a petitioning creditor, and even if he had attached the property of the alleged bankrupt, as it is claimed, within four months preceding the filing of the involuntary petition, the very act of filing the involuntary petition had for its object the annulment of that lien, and hence he could not be in any sense a preferred creditor. This is not a case where the creditor had attached and reduced his claim to judgment and sold the property upon execution and satisfied his claim in part within the four months' period. The facts are that Thornton brought the action in the state court on the claim assigned to him by W. W. Lucius within the four months' period, and in said action caused an attachment to be issued, but as soon as that was done he discovered that the alleged bankrupt had conveyed all of his property in fraud of his creditors and for that reason abandoned the action in the state court and joined with other creditors in the involuntary petition.

Section 67c of the Bankruptcy Act, now 11 U. S. C. A. § 107c, invalidates every lien by legal proceed-

ings, including attachment within four months before the filing of the petition, and hence when Thornton became a petitioning creditor he, in legal contemplation, requested the court to invalidate the lien that he had obtained by adjuding the debtor a bankrupt, and that is clearly a surrender of his preference, if it can be called such.

The record in this case, however, does not even disclose that any property was in fact attached, and in the absence of such showing there is no foundation for the contention that Thornton had obtained a preference.

In re Automatic Typewriter Co., 271 Fed. 1 (2nd Cir.), the precise question was raised. The court held:

> "A creditor who, in good faith, obtains an attachment against a debtor's property within four months of the filing of a petition in bankruptcy, may join in the petition to have the debtor adjudicated an involuntary bankrupt. Stevens v. Nave-McCord Mercantile Co. (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71; In re Hornstein (D. C., N. Y.), 10 Am. B. R. 308, 315, 122 Fed. 266. And this although the attachment has not been formally released. The court has the power to require the attachment lien to be released befor an adjudication is entered. In re Stevens v. Nave-McCord, supra, Sanborn, J., writing for the court said:

'Such a preferred creditor may present or may join in a petition for an adjudication of bankruptcy. But he may not be counted for the petition unless he surrenders his preference before the adjudication.'

"If an adjudication be had here, the effect would be a dissolution of the attachment obtained and therefore there would be no preference to the petitioning creditor. It is thus obvious that the fact that an attachment was obained here and was not formally vacated by an order of the court at the time of the filing of the petition, did not give a preference and did not incapacitate the petitioner from filing the petition. The advantage, if any, were gained by the writ of attachment, cannot avail the petitioner in the bankruptcy court, and it therefore cannot defeat the right of a creditor having a provable claim of the requisite nature and amount to file a petition in involuntary bankruptcy.

"We find nothing in the Bankruptcy Act itself which forbids a creditor filing a petition under similar circumstances. While the attachment obtained by the respondent remains unvacated of record, this respondent could not secure any advantage by that fact. When the order is entered vacating the attachment, it will be effective as of the date of decision of the court below vacating the same. This was a date before the bankruptcy. Furthermore, the preferred creditor who files a claim may surrender his preference at any

time before the claim is allowed. This he need not do before the filing of the claim. We think the court below committed no error in refusing to dismiss the petition in bankruptcy because of this."

Point IV.

A CREDITOR HOLDING AN UNLIQUIDATED CLAIM IS QUALIFIED TO ACT AS A PETITIONING CREDITOR, AND IT IS NOT NECESSARY THAT THE CLAIM SHOULD FIRST BE LIQUIDATED.

The position of Thornton, assignee of W. W. Lucius, as a creditor is challenged on the ground that his claim is unliquidated. The claim asserted is for several thousand dollars, the reasonable value of services rendered by W. W. Lucius, an architect, in preparation of plans and specifications for the alleged bankrupt in connection with his building operations. It is conceded that Lucius was engaged to prepare plans and specifications and that he did the work. The controversy is over the manner and amount of compensation, Lucius claiming the reasonable value of the services rendered, while the bankrupt claims that there was a special arrangement governing the amount of compensation.

The appellant contends that neither Lucius or Thornton, his assignee, were qualified to act as peti-

tioning creditors prior to the liquidation of this claim. We submit that there is no foundation for this contention and that the law has been definitely settled in this respect by the Supreme Court of the United States.

In Grant Shoe Co. v. Laird Co., 212 U. S. 445, one of the petitioning creditors presented a claim for $3700.00 "for the breach of an express warranty of shoes" sold to the creditor by the alleged bankrupt. It was there contended that the creditor could not be a petitioner until his claim had been liquidated. The District Court made an adjudication which was affirmed by the Circuit Court of Appeals, and on appeal to the Supreme Court of the United States it was held (opinion of Mr. Justice Holmes):

> "Coming to the question certified, we are of opinion that the decision of the courts below was right. The argument to the contrary is based on the letter of the statute, and is easily stated and understood. By Section 59b petitions to have a debtor adjudged a bankrupt may be filed only by creditors who have provable claims. By Section 63b, 'Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.' The word 'thereafter' shows, it is said, that they are not yet proved to exist when merely presented and sworn to. Therefore it does not yet appear that there is any foundation for the proceeding, in the requisite amount or even the existence of the claim. But there must be a pro-

ceeding in court before a liquidation can take place, and, therefore, the claim cannot be liquidated until a proceeding is started in some other way. In short, the claim upon which the petition is based must be provable when the petition is filed, and this claim was not provable then since by the express words of the Act it had to be liquidated before it could be proved.

"On the other hand, by the equally express words of Section 63a, among the debts that may be proved are those founded upon a contract express or implied. Again, by Section 17, the discharge is of all 'provable debts' with certain exceptions, and it would not be denied that this claim would be barred by a discharge. Tindle v. Birkett, 205 U. S. 183, 18 Am. B. R. 121. If the argument for the plaintiff in error is sound, a creditor for goods sold on a quantum valebant would be as badly off as the petitioner, and both of them might be postponed in reducing their claims to judgment until it was too late. The intimation in Twindle v. Birkett, sup., and Crawford v. Burke, 195 U. S. 176, 12 Am. B. R. 659, are adverse to such a result. The whole argument from the letter of the statute depends on reading 'provable claims' in Section 59b as meaning claims that may be proved then and there when the petition is filed. But if it can be seen then and there that the claims are of a kind that can be proved in the proceedings, the words are satisfied; and further, no reason appears why a liquidation may not be ordered on the filing of

> the petition to ascertain whether it is filed rightly or not."

Appellant cites in support of his contention the case of Harmony Creamery Company, 18 Fed. 609, but no such case is cited in the place indicated, nor have we been able to find this citation in any other volume.

In Spear v. Gordon, 12 Fed. (2nd) 778, (1st Cir.), the petitioning creditors' claims were unliquidated. The District Court refused to hear evidence in support of the petition and dismissed it on the ground "that the petitioner's claims, though contractual, were not liquidated and therefore they did not qualify as petitioning creditors having provable claims." The Court of Appeals held:

> "In thus ruling the court erred. It should have received the petitioners' evidence and determined the questions arising on the petition. Unliquidated claims arising out of contract are provable within the meaning of the Bankruptcy Act, although damage claims for tort are not. 1 Remington on Bankruptcy, Section 257; Grant Shoe Co. v. Laird Co., 212 U. S. 445, 21 Am. B. R. 484, 29 S. Ct. 332; Clarke v. Rogers (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 F. 518; Pratt v. Auto Spring Repairer Co. (C. C. A., 1st Cir.), 28 Am. B. R. 483, 196 Fed. 495."

In re Post, 12 Fed. (2nd) 941, affirmed by the Cir-

cuit Court of Appeals without opinion, 12 Fed. (2nd) 942, the right of a creditor holding an unliquidated claim to act as a petitioning creditor was challenged and the court held:

> "The fact that the exact amount is not yet determined is not a bar. Grant Shoe Co. v. Laird, 212 U. S. 445, 21 Am. B. R. 484, 29 S. Ct. 332; Remington on Bankruptcy, Vol. 2, Sec. 811; Williams v. U. S. Fidelity & Casualty Co., 236 U. S. 549, 34 Am. B. R. 181, 35 S. Ct. 289."

Under these authorities there can no longer be any question as to the right of a creditor holding an unliquidated claim arising out of contract to act as a petitioning creditor.

Point V.

PAYMENT TO PETITIONING CREDITORS SUBSEQUENT TO FILING OF THE INVOLUNTARY PETITION WILL NOT DISQUALIFY SUCH CREDITORS AND WILL NOT PRECLUDE AN ADJUDICATION IN BANKRUPTCY.

The involuntary petition was filed September 29, 1929. The petitioning creditors were National Electric Company, D. L. Conley as assignee of Nilsson Wall Paper Company, and Gilbert I. Thornton as assignee of W. W. Lucius. Thereafter two intervening petitions were filed, one by Cress & Company

and the other by Commercial Casualty Insurance Company.

On November 6th the alleged bankrupt attempted to avoid the involuntary petition and intervening petitions by attempting to pay the claims of two of the original creditors, to-wit: National Electric Company and D. L. Conley assignee of Nilsson Wall Paper Company, and Cress & Company, an intervening creditor. In the case of Cress & Company the money was paid to and accepted by the creditor. In the case of D. L. Conley as assignee of Nilsson Wall Paper Company the payment was not made to D. L. Conley, assignee, who was the petitioner, but was made to Nilsson Wall Paper Company, the assignor. In the case of National Electric Company an attempt to make payment was made by delivering the amount of the claim to a clerk in the office of the creditor who had no authority to receive the same or to discharge the obligation or to change the creditor's position as a petitioning creditor. The same day that the money was received by the clerk, when she called it to the attention of the officers of the corporation they promply attempted to return the money to the alleged bankrupt by mailing it to him by registered mail, but the alleged bankrupt refused to receive it and it was returned to the National Electric Company. The money was again forwarded by registered mail and again refused and was returned. The pay-

ment to the assignor in the former instance was not a payment in discharge of the indebtedness which at the time was owned by D. L. Conley, the petitioner; and in the latter case the payment to the clerk who had no authority to receive or accept the same cannot in law constitute a discharge of the obligation to the petitioner; but in any event, even if payment had been made direct to the petitioners and received by them, it would not effect the status of he involuntary and intervening petitions and the court would not be precluded from entering an adjudication thereon.

NONE OF THE THREE CREDITORS REFERRED TO WITHDREW THEIR PETITIONS, NOR DID THEY MAKE ANY APPLICATION FOR LEAVE TO DO SO, NOR WAS ANY APPLICATION MADE TO THE COURT TO DISMISS THE PROCEEDINGS.

Section 59-g of the Bankruptcy Act, now 11 U. C. C. A. § 95-g, provides:

> "A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors

> of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard."

Section 58 of the Bankruptcy Act, now 11 U. S. C. A. § 94, provides:

> "Creditors shall have at least ten days' notice by mail * * of * * * (8) the proposed dismissal of the proceedings."

These two provisions preclude a creditor who has become a petitioner from dismissing or abandoning the proceeding at will. This could only be accomplished by petitioning the court and giving **notice to all of the creditors of the alleged bankrupt,** and this can only be done after the court has required the bankrupt to file a schedule of his creditors with their addresses and has caused notice to be sent to all of the creditors of the application to dismiss or withdraw the proceeding. This provision was obviously intended to preserve the status of the involuntary petition so as to afford other creditors of the alleged bankrupt an opportunity to come in and continue the application for an adjudication so that they may have the benefit of the time of the filing of the original petition. None of the proceedings contemplated by Section 59-g, now 11 U. S. C. A. § 95-g, of the Bankruptcy Act were taken in this case. As the record stood before the court at the time of the hear-

ing before the special master and at the time of the hearing on the exceptions to the report, there was a valid petition with the requisite number of petitioning creditors.

The existence of the requisite number of creditors must be determined as of the date of the filing of the involuntary petition, and if the petitioners were creditors at that time the subsequent conduct of the bankrupt could not destroy their status as petitioning creditors, at least not without complying with the provisions of the act referred to above.

In Ward v. Lowery, 295 Fed. 60, (5th Cir.) (Certiorari denied in the Supreme Court), an alleged bankrupt paid off a creditor after the petition was filed and then by answer set up that fact as a bar to the adjudicaion. (Same was done in this case.) The court sustained motions to strike out this answer and later made an adjudication, notwithstanding the fact that one of the three creditors had been paid. The Circuit Court of Appeals held:

> "The court's memorandum opinion shows that it found that the Magnolia Petroleum Company still appears on the court records as one of the original petitioning creditors, and that the court concluded that the mere fact of the payment as alleged of the debt owing to that petitioner did not constitute an elimination of that petitioner as a party. So far as appears, no application was made

for leave for the Magnolia Petroleum Company to withdraw as a petitioner. Amended section 59-g of the Bankruptcy Act provided:

(Here court quotes Sec. 59-g.)

While this provision does not deal with the subject of a withdrawal by a petitioning creditor, it shows that action by one such creditor vitally affecting the proceedings involves rights therein of his co-petitioners and other creditors, and that it is a function of the court to protect those rights from impairment by such action without creditors not participating therein having an opportunity to be heard in regard thereto. To say the least, it is doubtful whether one of several petitioning creditors properly could be permitted to withdraw without notice to his co-petitioners and other creditors, or whether a permitted withdrawal of one of several petitionnig creditors on the sole ground that the debt to him was paid or satisfied after the petition was filed could have the effect of depriving his co-petitioners of the right to prosecute the petition to an adjudication. In re San Jose Baking Co. (D. C., Cal.), 36 Am. B. R. 635, 232 Fed. 200; In re Beddingfield (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190. However that may be, we are not of opinion that the power of the court to proceed to an adjudication is destroyed by the alleged bankrupt paying, after the filing of the petition, the debt owing to one of several petitioning creditors. It is incompatible with the rights acquired by the other petitioning

> crediors by their joining in the petition for the alleged bankrupt to have the power, without notice to such creditors or action by the court, to halt the proceeding or deprive it of life by reason of paying or satisfying, after the filing of the petition, the debt owing to one of the petitioning crediors."

In re Bedingfield, 96 Fed. 190, (U. S. D. C., Ga.), three creditors filed an involuntary petition and soon after the petition was filed one of the creditors, Carlton & Smith, gave notice that they desired to withdraw from the proceeding. About an hour before the petition was filed but after it was executed, this creditor transferred the claim to the firm of Fain & Stamps in the interest of Kelly Bros., a creditor who had obtained a preference. The Court held:

> "The question is whether or not this withdrawal should be allowed. It seems to me that it would be very bad practice to countenance such a transaction. If creditors having, as in this case, a number of small claims, amounting to something over $500, join in a petition for involuntary bankruptcy, where there has been a transfer of property and a preference in violation of the Bankrupt Act, and one of the petitioning creditors can withdraw in order to reduce the amount of the petitioning creditors' debts below $500, it would open the way for debtors giving such a preference, and the person preferred to settle with a portion of the creditors, and thereby de-

feat the proceeding, however palpable the preference might be. The Bankrupt Act has an express provision against any such proceeding. Sec. 59, cl. g. is as follows: 'A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.' Where a creditor joins in a proceeding in involuntary bankruptcy, and allows the petition to be filed, and afterwards obtains a settlement in some way, it is too late to withdraw from the proceeding in the way attempted here. On the face of the papers, this is a clear preference of one creditor. It appears that the entire property of Bedingfield was transferred to one creditor for an antecedent debt, leaving nothing whatever to the other creditors. If, by the aid of third parties, the debt of one of the creditors can be brought up, so as to reduce the amount below $500, it will enable the debtor to protect his preference, and defeat the whole purpose of the Bankrupt Act."

In re San Jose Baking Co., 232 Fed. 200, (U. S. D. C., Northern District of California), Judge Dooling held:

"It is not within the power of a creditor who joins in good faith in a petition to have his debtor adjudged a bankrupt thereafter to withdraw from such petition, and prevent the matter from proceeding, so long as any of the petitioning creditors insist that the matter do proceed. It is doubt-

ful whether such petitioning creditor may withdraw in any event without leave of court so to do. Any other rule would leave the door open for the perpetration of fraud, and the surreptitious bargaining between the debtor and petitioning creditors in an effort to procure the withdrawal of a sufficient number of the latter to reduce the amount of claims or the number of creditors below the requirements of the statute. The Court cannot inquire into the good faith of every attempted withdrawal, nor indeed is there any way to prove the secret bargainings between debtor and creditors, and the only way to prevent them is to hold such attempted withdrawals to be ineffectual so long as any of the petitioning creditors desire in good faith to prosecute their petition to an adjudication."

The foregoing authorities clearly support our contention that it was not within the power of the alleged bankrupt by making payments subsequent to the filing of the petition to destroy the status of the petitioners as creditors, nor was it within the power of the creditors themselves to withdraw or abandon or dismiss the proceedings without leave of court and compliance with the provisions of the Act. Hence the payment or the attempt to pay the creditors referred to was inoperative to destroy the involuntary petition.

Point VI.

GENERAL ORDER NO. 5 DOES NOT PRECLUDE ASSIGNEES THORNTON AND CONLEY FROM BEING PETITIONING CREDITORS IN THIS CASE.

It is contended that the petitioning creditors, D. L. Conley and Gilbert L. Thornton, are disqualified from being petitioning creditors because they are both assignees, that they purchased the claims for the purpose of becoming petitioning creditors, and that they have not complied with the provisions of General Order No. 5 as amended in 1926.

THORNTON CLAIM

Thornton was an assignee for collection. W. W. Lucius assigned his claim against Reed to Thornton about the first of July, 1929, for the purpose of enforcing payment of the claim. Out of the proceeds Thornton was to pay $750.00 to the National Electric Company in settlement of indebtedness from W. W. Lucius to National Electric Company on a note. The balance, after deducting the expense of the litigation, was to be turned over to W. W. Lucius. The assignment was made before any bankruptcy petition was contemplated and an action was commenced in the state court by Thornton as assignee

on the Lucius claim. It was while this action was pending that Thornton learned that Reed was transferring all of his assets to defraud his creditors. He thereupon abandoned the state court action and became a petitioning creditor in this proceeding.

In compliance with the requirements of General Order No. 5 there was attached to the amended involuntary petition an affidavit by Thornton setting forth the manner in which the assignment was made and the reason therefor, and among other things sets forth in his affidavit:

> "that the said claim was not purchased by me or assigned to me for the purpose of instituting bankruptcy proceedings; that at the time of the assignment of the claim to me no bankruptcy proceedings were contemplated and it was made for the purpose of instituting an action in the state court to enforce payment of the claim; that I became a petitioning creditor after the said action was instituted upon learning that the alleged bankrupt had transferred all of his property with intent to hinder, delay and defraud his creditors."

There is also attached to the amended involuntary petition the original assignment of the claim executed by W. W. Lucius to Thornton on October 31, 1929, which recites:

> "That this written assignment is made to confirm the oral assignment of the above described claim made by me to Mr. Thornton on or about the first day of July, 1929."

There is also attached to the amended involuntary petition an affidavit of Lucius, the assignor, which sets forth that he made the assignment of his claim to Thornton prior to July 16, 1929, that the assignment was for the purpose of collecting the amount due on the claim, and he swears on oath that the allegations of fact made by Thornton in his affidavit are true.

These affidavits and assignment attached to the involuntary petition clearly constitue a compliance with the requirements of General Order No. 5.

Finding of Fact No. V, made by the special master and approved and confirmed by the district judge, finds the facts in accordance with the affidavits referred to above, and finds specifically:

> "That the said assignment to Gilbert L. Thornton was made in good faith and without any oppressive intent or purpose, but was made with the bona fide intention and purpose of enabling Thornton to realize upon the claim of Lucius against Reed and out of the proceeds to liquidate the indebtedness of Lucius on the aforesaid note."

CONLEY CLAIM

Conley, one of the petitioning creditors, is an assignee of a claim of Nilsson Wall Paper Company. Attached to the amended involuntary petition is the original assignment of the claim showing that the assignment was made on September 28, 1929.

There is also attached to the amended involuntary petition an affidavit by D. L. Conley, the assignee, reciting,

> "That I purchased the aforesaid claim from the Nilsson Wall Paper Company and agreed to pay therefor the sum of One Hundred Ten Dollars ($110.00), and I am now the legal and beneficial owner of the said claim of Nilsson Wall Paper Company against George E. Reed; that this agreement to pay the sum of One Hundred Ten Dollars ($110.00) is the true and sole consideration for the assignment and transfer of said claim; that I am the bona fide holder and legal and beneficial owner of the said claim.
>
> "That the said claim was purchased by me at the request and suggestion of Commercial Casualty Company for the purpose of qualifying me as a petitioning creditor in this bankruptcy proceedings."

Finding of Fact No. IV, made by the special master and confirmed by the district judge, finds that

Conley was the owner of the claim and was the owner at the time the findings were made:

> "That the said assignment was made for a valuable consideration, to-wit, the agreement of D. L. Conley to pay to Nilsson Wall Paper Company the sum of $110.00 for said claim; that the purchase of said claim by D. L. Conley was made in good faith and without any fraudulent or oppressive purpose or intent, but was purchased by the said Conley at the request of the Commercial Casualty Insurance Company, a creditor of the alleged bankrupt, who was interested in securing an equitable distribution of the bankrupt's property among his creditors."

General Order No. 5, as amended in 1926, provides as follows:

> "Petitioners in involuntary proceedings whose claims rest upon assignment or transfer from other persons, shall annex to one of the duplicate petitions all instruments of assignment or transfer and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that the petitioners are the bona fide holders and legal and beneficial owners thereof and whether or not they were purchased for the purpose of instituting bankruptcy proceedings."

This General Order does not require that there should be any actual consideration for an assign-

ment of a claim, or that the consideration should be of any particular character, or that it should be adequate. All that the Order requires is that the facts respecting the consideration be set forth. It does not attempt to provide that in order for an assignee to be a pe a petitioning creditor he must have paid valuable or other consideration for the assignment. It does not attempt to change the law as fixed by the Bankruptcy Act and interpreted by decisions governing governing the right of assignees to be petitioning creditors as the law existed at the time the General Order was adopted.

The General Order requires the affidavit to state that the petitioner is a bona fide holder and legal and beneficial owner of the claim. The affidavits of Thornton and Conley both contain these allegations, and they are as a matter of law the legal and beneficial owners of the claims.

The position of an assignee of a claim for collection, or the assignee of a claim which he holds as security, must be determined according to the law of the state in which the petition is filed. In the State of Oregon an assignment of a claim as security or for collection constitutes the assignee a bona fide holder and the legal and beneficial owner of the claim and entitled under the law of the State of Oregon to sue in his own name.

In Haviland v. Johnson, 70 Ore. 85, the Court held:

> "An assignment of a claim for the purpose of collection is based upon a valuable consideration, and is sufficient."

In French & Co. v. Haltenhoff, 73 Ore. 247, the Court held:

> "The assignee of a chose in action may sue thereon in his own name, and a consideration for the assignment need not be proved."

In Collins v. Heckart, 127 Ore. 43, the Court held:

> "It has been held by this court that the assignee of a chose in action may maintain an action thereon in his own name although he may have paid no consideration therefor. Among the decisions, see Gregoire v. Rourke, 28 Ore. 275, (42 Pac. 996); Haviland v. Johnson, 70 Ore. 83 (139 Pac. 720)."

In Levins v. Stark, 57 Ore. 189, the Court held:

> "Any declaration, either in writing or by word of mouth, that a transfer is intended, will be effectual, providing it amounts to an appropriation to the assignee."

In Hackett Digger v. Carlson, 127 Ore. 386, the Court held that an unliquidated claim arising out of contract may be assigned.

The last clause of General Order No. 5 requires the affidavit to state

> "whether or not they were purchased for the purpose of instituting bankruptcy proceedings."

It merely requires the petitioner to state the facts in respect thereto. It does not require that they should make an affirmative showing that the claim was not purchased for that purpose. Neither does the General Order provide that if the claim was purchased for such a purpose that the petitioner would be disqualified. The Supreme Court in framing this requirement merely intended that the facts surrounding assignments of claims should be presented to the court, but **it imposed no penalties, nor did it attempt to create any disqualifications** nor in any other manner attempt to change the law governing the right and status of assignees to be petitioners. Indeed, if the Supreme Court had attempted by rule to change the law governing the right and status of assignees to be petitioning creditors the rule would be inoperative, for the power to make rules is limited to the procedure for carrying the Bankruptcy Act into effect.

Section 30 of the Bankruptcy Act, now 11 U. S. C. A § 53, confers power to adopt General Orders in the following language:

> "All necessary rules, forms and orders as to **procedure** and **for carrying this act into force and**

effect shall be prescribed and may be amended from time to time by the Supreme Court of the United States."

Of course, any rule which would attempt to change the law with respect to the rights and status of assignees of claims would be he exercise of power in excess of that conferred by the foregoing section of the Bankruptcy Act, and any rule which could deny to an assignee of a claim the position of a creditor within the meaning of Section 59, of the Act, 11 U. S. C. A. § 95, would not be a provision dealing with procedure or for carrying the Act into effect.

In Meek v. Centre County Banking Co., 268 U. S. 426, the Supreme Court invalidated its own General Order No. 8 because it exceeded the rule-making power in that it attempted to deal with substantive law. The cour held:

> "The authority conferred upon this court by Section 30 of the Bankruptcy Act (Comp. St. Sec. 9614) to prescribe all necessary rules, forms and orders as to procedure and for carrying the Act into effect, is plainly limited to provisions for the execution of the Act itself, and does not authorize additions to its substantive provisions. West Co. v. Lea, 174 U. S. 590, 599, 19 S. Ct. 836, 43 L. Ed. 1098. And see Orcutt Co. v. Green ,204 U. S. 96, 102, 27 S. Ct. 195, 51 L. Ed. 390."

In re City Contracting & Bldg. Co., 30 A. B. R. 133, no Federal citation, in a lengthy discussion of the application of General Orders, the Court held:

> "So far as concerns any power to make rules, derived from Section 2, Clause 15, of the Act, 30 Stat. 547, as a basis for the possible wide scope of this General Order, it is to be observed that **the power to make rules is not the power to legislate; rules may enforce the statute but not enlarge it.** And so far as concerns any policy of liberal construction to effect the remedial purpose of the act, it is not to be overlooked that to construe liberally is not to read into the statute something which its own erms do not clearly express or imply."

If the last sentence of General Order No. 5, which requires the assignee to state in his affidavit "whether or not they were purchased for the purpose of instituting bankruptcy proceedings" should be construed as a limitation upon the class of persons who may be petitioning creditors, the General Order would be void because it would be adding a substantive provision of law to the Act and would constitute legislation, because the law as it existed at the time the rule was adoped did not preclude an assignee from becoming a petitioning creditor on the ground that he purchased the claim for that purpose.

It is an elementary rule of construction of sta-

tutes and rules that if two constructions can be indulged in—one which would render it void and the other which would be consistent with its validity, the latter construction will be adopted, and the General Order can be and should be construed so that it will not be held to be a violation of Section 30 of the Bankruptcy Act. The amendment of General Order No. 5, resulting in the addition of the clause referred to, was the result of abuses which had sprung up in the bankruptcy practice. One was the practice of collection agencies and attorneys who went about purchasing claims against business concerns which were in precarious financial condition, for the express purpose of throwing the concern into bankruptcy and thereby creating an estate for administration which would be a source of revenue to them. Another abuse was the practice of corporations that made a business of acquiring claims against business concerns that were in precarious condition for the purpose of throwing them into bankruptcy so that they could be liquidated and reorganized and the acquired by such corporations. **Lowenstein v. McShane, 130 Fed. 1007,** is a case which illustrates the vices aimed at by the amendment to the General Order No. 5. These are instances of parties who are not creditors of the alleged bankrupt and had no interest in its affairs or its liquidation other than the satisfaction of selfish interest, and the acquiring of claims for that purpose was indeed a species of champerty, being in effect the

purchase of litigation.

But the courts have always approved the activity of creditors who are interested in the estate of an insolvent debtor to obtain petitioning creditors by solicitation or through the purchase of claims so that the insolvent debtor could be edjudicated a bankrupt and in that way preserve the estate for the equitable distribution among all of the creditors. It is frequently necessary in order to avoid fraudulent transfer and dissipation of assets, for one creditor to go out and solicit other creditors to join in the petition, or where necessary to cause a claim to be purchased to obtain the necessary number of petitioning creditors. In such cases the purpose is legitimate. It is not a vicious attempt to throw into bankruptcy a concern in which the purchasers of claims have no interest other than the creation of a source of revenue for themselves. In the cases where creditors themselves are active to obtain the requisite petitioning creditors it is done for an honest and lawful purpose of bringing into the bankruptcy court the assets of the insolvent debtor for equitable distribution and to make available to all creditors the machinery of the bankruptcy court to recover such assets as have already been fraudulently disposed of. In such case the creditor who engages in the activity of obtaining an adjudication in bankruptcy by causing claims to be purchased gains no special advantage for himself.

Whatever advantage such creditor gains is one that is available to all of the creditors and for the benefit of all of the creditors. That is precisely the situation in the case at bar with respect to the Conley claim. The Thornton claim was not purchased with any idea of a petition in bankruptcy being filed. In fact, he started an action in the state court upon his assigned claim, and it was only after he learned of the dissipation of the debtor's assets that he became a petitioning creditor. The Conley claim was purchased from the Nilsson Wall Paper Company with the purpose in view of qualifying as a petitioning creditor. The Commercial Casualty Insurance Company, who was itself a creditor of the alleged bankrupt, suggested and requested Conley to purchase this claim. The court has found as a fact (Finding No. IV):

> "That the purchase of said claim by D. L. Conley was made in good faith and without any fraudulent or oppressive purpose or intent, but was purchased by the said Conley at the request of the Commercial Casualty Insurance Company, a creditor of the alleged bankrupt, who was interested in securing an equitable distribution of the bankrupt's property among his creditors."

This finding of fact removes any question of the good faith of Conley in purchasing the claim, or of Commercial Casualty Insurance Company in suggesting and requesting Conley to purchase the same for

the purpose of becoming a petitioning creditor. The Commercial Casualty Insurance Company, which requested Conley to purchase the claim and become a petitioning creditor, was vitally interested in Reed's activity and property, for it had written a surety company bond guaranteeing the performance of a contract. It had become liable for a large indebtedness, the exact amount of which was at the time unknown. Many claims by mechanics and materialmen had been asserted against Reed and the holder of bond was in turn asserting claim on the bond against the casualty company. Reed was liable to the insurance company on his indemnity agreement.

The amendment of the General Order No. 5 was sponsored by the American Bar Association, and in the reports of the American Bar Association, 1925, page 492, in discussing the reasons for the adoption of the amendments and their operation, the report says:

> "The amendment does not provide for the consequences of a failure to comply with its beconstruction in the interest of justice and fairhests, but this will afford a subject for judicial play." (Reports of Am. Bar Ass'n., 1925, p. 492.)

In other words, the amendment was sponsored and adopted upon the theory that when an assignee of a claim is a petitioning creditor he should present to the court at the very threshold of the proceeding the

facts surrounding the purchase and the acquirement of the claim so that the court could at the very inception of the proceeding inquire into and determine whether the purchase of the claim was for a lawful and legitimate and equitable purpose or whether it was done for a champertous or oppressive purpose. If the former, the right of the assignee to be a petitioning creditor must be recognized under the law as it existed at the time of the adoption of the rule, and if the latter be found to be the case then the court in the exercise of its general equity powers has the right to reject the petition of an assignee which was found to be based upon a claim purchased for champertous or oppressive purposes. But there is nothing in the General Order which warrants the construction that the mere fact that an assignee purchased the claim for the purpose of becoming a petitioning creditor would of itself disqualify him as such. To give the rule such a construction would be legislaion by the Supreme Court and hence void.

Un der the General Order the question of the good faith of the assignment and the purchase of claims becomes a question of fact if an issue is raised by answer to the petition. Such an issue of fact was raised in this case and the findings of the special master and the district court are supported by evidence.

We submit that where a creditor ascertains that a debtor has fraudulently conveyed his property so

as to hinder, delay and defraud his creditors and is insolvent, that it is lawful and proper and commendable for such a creditor to do all in his power to bring that property back into the estate of the debtor so as to make it available for distribution to all of his creditors, and that can only be accomplished by the machinery provided for by the Bankruptcy Act. If it is necessary to accomplish that purpose we can see no impropriety, or the violation of any standard of good faith, for such a creditor to induce other creditors to join in an involuntary petition. If he is unable to persuade another creditor to become a petitioner, due to the creditor's reluctance or other reasons, we can see no impopriety in advising and requesting someone else to purchase the claim of the reluctant creditor and thus become a petitioning creditor.

When a creditor who is qualified to become a petitioner sells and assigns his claim he sells it with all of the rights and remedies which the law affords him. This includes the right to become a petitioning creditor, and this right passes to the assignee. The fact that the creditor may see fit not to exercise that right himself does not deprive him of the right, and if he sells his claim the right goes with it

Prior to the adoption of General Order No. 5 the right of an assignee to be a petitioning creditor was

well established. An assignee was accorded all of the rights of an assignor, and the right to be a petitioning creditor was determined as of the date when the indebtedness accrued and not as of the date of the assignment. There is no amendment to the Act nor any line of decission subsequent to the adoption of General Order No. 5 which in any way changes the law in this respect.

Section 59 (b), 11 U. S. C. A. § 95 (b), provides:

> "Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

This section which provides who may be petitioning creditors merely imposes the qualification that the petitioner must be a creditor having a provable claim. No other qualification or limitation is imposed.

Section 1 (9), of the Bankruptcy Act, 11 U. S. C. A. § 1-(9), provides:

> "'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney,

or proxy."

Section 1 (11), 11 U. S. C. A. § 1-(11), provides:

> "'Debt shall include any debt, demand, or claim provable in bankruptcy."

One who is an assignee of a claim for collection clearly comes within the provisions of Section 1 (9), for he may be said to be a duly authorized agent; and one who has purchased a claim for a consideration is himself a creditor under the same subdivision.

In re Bevins, 165 Fed. 434, (C. C. A., 2nd Cir.), an involuntary petition was filed against Bevins by Becker & Company, Goetz and Fisher. The alleged bankrupt denied that there were three creditors and alleged that Goetz and Fisher bought claims against the alleged bankrupt for $40.00 and $16.00 respectively, "for and with the funds of Becker & Company." The District Court referred the issues to a special master who reported in favor of adjudication. On appeal to the Circuit Court of Appeals the Court held:

> "We follow the finding of the master and of the district judge that Fisher and Goetz were the real owners of the claims purchased by them against the alleged bankrupts and that therefore the requirement of Section 59b of the Bankrupt Act that there should be three petitioning creditors, is satisfied.
>
> "The right to purchase claims in order to

make up the necessary number of petitioning creditors was upheld under the Act of 1867 in re Woodford (Fed. Cas. No. 17,972, 13 N. B. R. 575).

"The claim of Becker & Company was provable when the petition was filed and as the petitioning creditors then represented an indebtedness over $500, the requirements of Section 59b were satisfied in this respect also. In re Hornstein (10 A. B. R. 308, 122 Fed. 266; in re Mertens, 16 A. B. R. 825, 147 Fed. 177."

In the following cases it was held that an assignee may be a petitioning creditor irrespective of the purpose of the assignment.

Re Page Motor Car Co., 251 Fed. 318.
In re Veller, 249 Fed. 633, (C. C. A., 6th Cir.)
Re Halsey El. Gen. Co., 163 Fed. 118.
Re Hanyan, 180 Fed. 498, affirmed by C. C. A. 2nd Cir., on opinion of Dist. Ct. 181 Fed. 1021.
Leighton v. Kennedy, 129 Fed. 737, (C. C. A., 1st Cir.)

In re Automatic Typewriter Co., 271 Fed. 1, (C. C. A. 2nd Cid.), the Court held:

"The fourth defense pleads that the alleged bankrupt's involuntary petition in bankruptcy was not filed in good faith, but was filed vexatiously and maliciously for the sinister, selfish

and ulterior purpose of defeating the claim of the cause of action set forth in the counterclaim of the revising petitioner. If it be proved by competent evidence that the banrupt is insolvent and committed acts of bankruptcy and the other necessary jurisdictional facts are present, an adjudication in bankruptcy will follow therefrom, and what reasons or motives inspired or instigated the proceedings, are of no importance and will not defeat an adjudication. It is the right of action which is evidenced by facts alleged and proven that must prevail; whatever may be the motive it will not support or defeat the cause of action."

The cases clearly establish that an assignee who purchased a claim for the purpose of becoming a petitioning creditor is not disqualified, and the General Order No. 5 does not disqualify but merely requires the court to investigate the good faith of the transaction at the outset of the proceeding for the purpose of avoiding the abuses illustrated by the case of Lowenstein v. McShane, supra.

CASES CITED BY APPELLANT

Appellant cites the case of **Stroheim v. Perry** several times throughout his brief. In this case a holder of several notes made by the alleged bankrupt assigned one of the notes without any consideration to an nominal party for the purpose of qualifying him

as a petitioning creditor. It was a typical case of splitting up a claim for the purpose of creating several petitioning creditors, a practice which has always been condemned. In the case at bar we have no such situation.

Trammel v. Yarbrough, cited several times throughout the brief and particularly in support of the proposition that as to intervening creditors the four month period is to be computed to the date of the filing of the intervening petition and not as of the date of the filing of the original petition, and by this species of computation appellant arrives at the conclusion that the transfers were made more than four months prior to the filing of the petition in bankruptcy. The case does not support any such doctrine. In that case the original petition was dismissed after a hearing. Thereafter other creditors attempted to reopen the case to enable them to intervene. The court held that if they were permitted to do so the four months period would have to be computed from the date that the intervening petitions were filed. That was expressly predicated upon the ground that the original petition had been dismissed and there was no proceeding to which they could become a party so as to keep alive the proceedings from their inception. The language of the case clearly indicates that had an intervening petition been filed prior to the dismissal of the proceedings that they would have

been treated as having been filed as of the date of the original petition.

CONCLUSION

The record discloses a palpable scheme on the part of the alleged bankrupt to cheat his creditors. He conveyed away every bit of property that he had—some of it directly and some of it through the medium of a corporation which was a mere sham. The result of these conveyances was to leave him stripped of every asset, according to his own admission. The court has found these conveyances to be palpably fraudulent. The most important asset of them all we find in the hands of his lawyer who now represents him in these proceedings. As soon as he has parted with all of his property he immediately burns and destroys all of his records, notwithstanding the fact that claims were being asserted and liens were being filed, and he now seeks by the interposition of numerous objections to frustrate an attempt to undo as far as the Bankruptcy Act makes it possible the mischief he has done. When these bankruptcy proceedings were instituted and the issues were about to be tried he makes an attempt to frustrate these proceedings by paying off some of he petitioning creditors in an attempt to disqualify them as petitioners. The whole course of conduct of the alleged bankrupt is one that cannot be too severely condemned. We submit that he should not be permitted

to escape by stretching the rules of interpretation of the Bankruptcy Act and General Orders to the breaking point to make available to the alleged bankrupt the technical objections which he has interposed.

The special master had before him all of the witneses; he heard their testimony and observed their demeanor. A great deal of testimony was taken and he made findings of fact supporting every requirement to sustain the petition. The matter was reviewed by Honorable Robert S. Bean, Judge of the District Court, upon exceptions to the special master's report, and he overruled the exceptions and confirmed the report and ordered an adjudication after a lengthy hearing and thorough examination of the case, and we respectfully submit that these findings and conclusions of law should be sustained.

Respectfully submitted,

S. J. BISCHOFF,
Attorney for Petitioning Creditors.

WILBUR, BECKETT,
HOWELL & OPPENHEIMER, and
KREIS & RONCHETTO,
Of Counsel.

No. 6165

United States
Circuit Court of Appeals
For the Ninth Circuit.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation,
Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOSEPH A. BROWN and A. L. CRAWFORD, De Young Building, San Francisco, California,
Attorneys for Plaintiffs.

HARLEY F. PEART and GUS L. BARATY, Esqrs., 111 Sutter Street, San Francisco, California,
Attorneys for Defendants.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. ——.

Dept. No. ——.

BELVA FORREST and RONALD CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,

Plaintiffs,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, JOHN DOE COMPANY, a Corporation, and RICHARD ROE CO., a Corporation,

Defendants.

COMPLAINT.

Plaintiffs complain of defendants and for cause of action allege:

I.

That the defendant herein, Indemnity Insurance Company of North America, is now and was at all of the times herein mentioned an insurance corporation duly formed, organized and existing under and by virtue of the laws of the State of Pennsylvania, and that said company is a duly qualified and existing insurance company lawfully and legally qualified to engage in the insurance business in the State of California, and doing business in the City and County of San Francisco, State of California, and having an office and principal place of business in the City and County of San Francisco, State of California.

II.

That John Doe Company is a duly and legally organized insurance company, duly existing by virtue of the laws of the State of California, a corporation organized thereunder and doing business therein, and entitled under the laws of the State of California to conduct business therein. [1*]

III.

That Richard Roe Company is herein sued under the fictitious name of Richard Roe Company because the true name of such defendant is unknown to plaintiffs, and plaintiffs ask that when such true

*Page-number appearing at the top of page of original certified Transcript of Record.

name is ascertained this complaint be amended by inserting such true name in lieu of such fictitious name.

IV.

That heretofore and during the year 1926 and prior to the 8th day of August, 1926, the defendants herein made, executed and delivered to one Mary C. Kittredge, also known as Mrs. E. H. Kittredge, their certain policy of insurance wherein and whereby, for a valuable consideration, the said defendants did insure the said Mary C. Kittredge, also known as Mrs. E. H. Kittredge, in the sum and amount of Ten Thousand ($10,000.00) Dollars, as follows:

Under the terms of the aforesaid policy including additional insured:

"Sec. A. It is hereby understood and agreed, unless limited by enforcement attached hereto that this policy is extended to cover as additional assured any person or persons riding in or legally operating any automobile described in the declarations and any person, firm or corporation, legally responsible for the operation thereof (excepting always a public garage, automobile repair shop, and/or sales agency, and/or service station and agents and employees thereof), provided such use or occupation is with the permission of the named assured, or if the named assured is an individual with the permission of an adult member of the assureds household other than a chauffeur or domestic servant."

That the exclusions referred to are as follows:

"EXCLUSIONS."

"C. This policy shall not cover in respect of any automobile (1) while driven or manipulated in any race or speed test; (2) while driven or manipulated by any person under the age fixed by law or under the age of sixteen years in any event; (3) while being used for towing or propelling any trailer or any vehicle used as a trailer. This Policy does not cover: (a) any liability of the Assured to any employe of the Assured while engaged in the maintenance or use of any automobile; (b) any liability voluntarily assumed by the assured; (c) any liability imposed by any Workmen's compensation law or agreement; (d) any loss under section C of this policy resulting from damage to or destruction of any tire due to [2] puncture, cut, gash, blowout or other ordinary tire trouble and excluding in any event damage to or destruction of tires unless caused by an accidental collision which also causes other damage to or destruction of the insured automobile."

V.

That said policy was in full force and effect on the 8th day of August, 1926, or thereabouts.

VI.

That the said automobile referred to and enumerated in said policy in special condition "A" was a certain Buick Sedan owned by the said Mary C. Kittredge, also known as Mrs. E. H. Kittredge.

VII.

That in Superior Court action No. 12,406 a judg-

ment was recovered by the plaintiffs herein against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages on account of the death of the husband of the plaintiff, Belva Forrest, and the father of Ronald Claude Forrest, a minor, plaintiffs herein, as a result of the ownership and maintenance of the said Buick Automobile of the said Mary C. Kittredge, also known as Mrs. E. H. Kittredge, on or about the 8th day of August, 1926.

VIII.

That on or about the 8th day of August, 1926, the aforesaid automobile of Mary C. Kittredge, also known as Mrs. E. H. Kittredge, was maintained, managed, and operated by one Roy Hooper, a chauffeur, while in the course of his employment as chauffeur by the said Mary C. Kittredge, also known as Mrs. E. H. Kittredge. That the said Roy Hooper was operating, managing, and maintaining the said Buick Automobile at the time of the injuries which caused the death of the said husband of plaintiff, Belva Forrest, and father of plaintiff, Ronald Claude Forrest, a minor. [3]

IX.

That said judgment is for the sum of Five Thousand Three Hundred and Twenty-four ($5,324.00) Dollars, principal sum, and Nine ($9.00) Dollars costs, and is dated the 22d day of March, 1928, that said judgment remains wholly unsatisfied and unpaid, and said judgment is final and has never been

vacated or set aside, and that the time for appeal has expired and that no motion for new trial is pending therein, and that no appeal has ever been taken therein.

X.

That in and by the said policy said defendants promised and agreed to pay any judgment obtained against the said Roy Hooper when the loss was made certain by judgment against the said assured after final termination of the litigation.

XI.

That said amount has been made certain by said judgment, as herein alleged, and the said litigation has finally terminated.

XII.

That an execution has issued against the property of the said Roy Hooper and has been returned wholly unsatisfied and *nulla bona.*

XIII.

That under and by virtue of said judgment, defendants herein are indebted to plaintiffs in the sum of Five Thousand Three Hundred and Thirty-three ($5,333.00) Dollars, and that neither the said sum nor any part thereof has been paid.

WHEREFORE, plaintiffs pray judgment against the defendants for the sum of Five Thousand Three Hundred and Thirty-three ($5,333.00) Dollars, for

legal interest from date of judgment, for costs herein, and for general and special relief.

JOSEPH A. BROWN,
S. L. CRAWFORD,
Attorneys for Plaintiffs. [4]

State of California,
County of Santa Clara,—ss.

Belva Forrest, being first duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has read the complaint therein and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters, she believes them to be true.

BELVA FORREST.

Subscribed and sworn to before me this 24 day of December, 1928.

[Seal] GEO. H. BENTLEY,
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Jan. 28, 1929. [5]

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 18,331—K.

BELVA FORREST and ROLAND CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,

Plaintiffs,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, JOHN DOE COMPANY, a Corporation, and RICH ROE CO., a Corporation,

Defendants.

DEMURRER.

Comes now the defendant Indemnity Insurance Company of North America, a corporation, and demurs to the complaint of plaintiffs on file herein, and for grounds of demurrer specifies:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That said complaint is uncertain in this, it does not appear therein, nor can it be ascertained therefrom:

(a) Whether it is claimed or whether it be a fact that said Roy Hooper was operating said automobile "with the permission of the named assured," or "with the permission of an adult member of the assured's household."

(b) Who is the named assured in the alleged policy of insurance.

(c) Whether it is claimed that said Roy Hooper was the agent of the named insured and was operating said automobile as an agent of the insured or whether it is claimed that he, not acting as such agent, had been given permission to use said [6] automobile, or upon which of said theories plaintiffs are relying.

(d) Whether the alleged policy of insurance is now in full or any force or effect.

(e) Whether plaintiff Ronald Claude Forrest is the sole surviving child of said decedent.

(f) Whether any judgment was ever obtained against the named assured in the said policy.

III.

That said complaint is ambiguous for the reasons and in the particulars whereinabove it is alleged to be uncertain.

IV.

That said complaint is unintelligible for the reasons and in the particulars whereinabove it is alleged to be uncertain.

WHEREFORE defendant prays that this demurrer be sustained and that plaintiffs take nothing

by their said complaint, and that it be hence dismissed with its costs.

HARTLEY F. PEART,
Attorney for said Defendant.

HARTLEY F. PEART hereby certifies that he is the attorney for the defendant Indemnity Insurance Company of North America, a corporation, herein; that the foregoing demurrer is not filed for delay and is in his opinion well taken in point of law.

HARTLEY F. PEART. [7]

State of California,
City and County of San Francisco,—ss.

John D. Gallaher, being first duly sworn, deposes and says: That he is and was at all the times herein mentioned a citizen of the United States over the age of twenty-one (21) years, and an attorney employed in the office of Hartley F. Peart; that he served the above demurrer upon Joseph A. Brown, one of the attorneys of record for the plaintiff herein, by leaving a copy thereof at the office of the said Joseph A. Brown in Room 623 of the DeYoung Building, in the City and County of San Francisco, State of California, on the 27th day of February, 1929, between the hours of 10 and 11 A. M. of said day.

JOHN D. GALLAHER.

Subscribed and sworn to before me this 27 day of February, 1929.

[Seal] LOUISE BEARDEN,
Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within demurrer is hereby admitted this 27th day of February, 1929.

_____,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 27, 1929. [8]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 12th day of March, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 12, 1930—ORDER OVERRULING DEMURRER.

Ordered that the demurrer to the complaint heretofore argued and submitted, being now fully considered, be and the same is hereby overruled, with leave to answer within ten days. [9]

[Title of Court and Cause.]

ANSWER TO COMPLAINT.

Comes now the defendant Indemnity Insurance Company of North America, a corporation, and

answers to the complaint of plaintiffs on file herein, and by way of defense thereto admits, denies and alleges, as follows:

I.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer that portion of paragraph VII of said complaint, wherein it is alleged that in Superior Court action No. 12,406 a judgment was recovered by the plaintiffs herein against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages on account of the death of the husband of the plaintiff, Belva Forrest, and the father of Roland Claude Forrest, a minor, plaintiffs herein, and therefore and placing its denial upon that ground denies that in Superior Court action No. 12,406 or in any court or in any action a judgment was recovered by the plaintiffs or either thereof against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages or otherwise and/or on account of the death of the husband of the plaintiff Belva Forrest and/or the father of Roland Claude Forrest, a minor, [10] the plaintiffs herein and/or either thereof. Defendant denies that any judgment was ever recovered as a result of the or any ownership and/or maintenance of the said or any Buick or other automobile of said Mary C. Kittredge, and/or also known as Mrs. E. H. Kittredge on or about the 8th day of August, 1926, or at any other time or ever or at all.

II.

Defendant denies that on or about the 8th day of August, 1926, or at any other time or at all, the aforesaid automobile or any automobile of Mary C. Kittredge and/or also known as Mrs. E. H. Kittredge, was maintained and/or managed and/or operated by one Roy Hooper, a chauffeur or otherwise, while in the course of his or any employment as chauffeur or otherwise or at all by the said Mary C. Kittredge and/or also known as Mrs. E. H. Kittredge. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer that portion of Paragraph VIII of said complaint, wherein it is alleged that the said Roy Hooper was operating, managing and maintaining the said Buick automobile at the time of the injuries which caused the death of the said husband of plaintiff Belva Forrest and father of plaintiff, Roland Claude Forrest, a minor, and therefore and placing its denial upon that ground denies that the said Roy Hooper was operating and/or managing and/or maintaining the said Buick or any automobile at the time of the injuries or any time or any injury which caused the death of the said husband of plaintiff Belva Forrest and/or father of plaintiff Roland Claude Forrest, a minor, and/or either thereof.

III.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph IX of said complaint [11] wherein it is alleged that said

judgment is for the sum of Five Thousand Three Hundred Twenty-four (5,324.00) Dollars, the principal sum, and Nine (9.00) Dollars, costs, and is dated the 22d day of March, 1928; that said judgment remains wholly unsatisfied and unpaid, and said judgment is final and has never been vacated, or set aside, and that the time for appeal has expired and that no motion for a new trial is pending therein, and that no appeal has ever been taken therein, and therefore and placing its denial upon that ground denies that said judgment is for the sum of Five Thousand Three Hundred Twenty-four (5,324.00) Dollars or any part thereof or any sum whatever, the principal sum or otherwise, and/or Nine (9.00) Dollars or any sum at all, costs, and/or is dated the 22d day of March, 1928, or any other time, and/or that said or any judgment remains wholly or at all unsatisfied and/or unpaid, and/or said or any judgment is final and/or has never been vacated, or set aside, and/or that the time or any time for appeal has expired and/or that no motion for a new trial is pending therein, and/or that no appeal has ever been taken therein.

IV.

Defendant denies that in and/or by said or any policy this defendant promised and/or agreed to pay any judgment obtained against the said Roy Hooper when the loss was made certain by judgment against the said assured after final termination of the litigation and/or otherwise or at all and denies that said Roy Hooper was an assured of this defendant.

V.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XI of said complaint wherein it is alleged that said amount has been made certain [12] by said judgment as herein alleged and the said litigation has finally terminated, and therefore and placing its denial upon that ground denies that said or any amount has been made certain by said judgment or otherwise as herein in said complaint alleged or otherwise or at all, and/or that said or any litigation has finally or otherwise terminated.

VI.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XII of said complaint and therefore and placing its denial upon that ground denies that an execution has issued against the property of the said Roy Hooper and/or has been returned wholly or at all unsatisfied and/or *nulla bona* or otherwise or at all.

VII.

Defendant denies that under and/or by virtue of said or any judgment or otherwise or at all this defendant is indebted to plaintiffs or either thereof in the sum of Five Thousand Three Hundred Thirty-three (5,333.00) Dollars, or any part thereof, or any sum whatsoever.

WHEREFORE defendant prays judgment that plaintiffs take nothing by their said complaint and

that it be hence dismissed with its costs, and for such other and further relief as to the Court may seem meet and proper.

HARTLEY F. PEART,
Attorney for said Defendant. [13]

State of California,
City and County of San Francisco,—ss.

R. W. Forsyth, being first duly sworn, deposes and says: My name is R. W. Forsyth; I am an officer, to wit, Pacific Coast Manager of the Indemnity Insurance Company of North America, a corporation, one of the defendants herein, and as such am authorized to and do make this affidavit for and on behalf of said defendant; that I have read the foregoing answer, know the contents thereof, and that the same is true of my own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters I believe it to be true.

R. W. FORSYTH.

Subscribed and sworn to before me this 25th day of July, 1929.

[Sea] DAISY CROTHERS WILSON,
Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within answer is hereby admitted this 25th day of July, 1929.

JOSEPH A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 25, 1929. [14]

[Title of Court and Cause.]

AMENDED ANSWER TO COMPLAINT.

Comes now the defendant, Indemnity Insurance Company of North America, a corporation, and files this its amended answer to the complaint of plaintiffs on file herein, and by way of defense thereto admits, denies and alleges as follows:

I.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer that portion of Paragraph VII of said complaint, wherein it is alleged that in Superior Court action No. 12,406 a judgment was recovered by the plaintiffs herein against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages on account of the death of the husband of the plaintiff, Belva Forrest, and the father of Roland Claude Forrest, a minor, plaintiffs herein, and therefore and placing its denial upon that ground denies that in Superior Court action No. 12,406 or in any court or in any action a judgment was recovered by the plaintiffs or either thereof against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages or otherwise and/or on account of the death of the husband of the plaintiff, Belva Forrest, and/or the [15] father of Roland Claude Forrest, a minor, the plaintiffs herein and/or either thereof. Defendant denies

that any judgment was ever recovered as a result of the or any ownership and/or maintenance of the said or any Buick or other automobile of said Mary C. Kittredge on or about the 8th day of August, 1926, or at any other time or ever or at all.

II.

Defendant denies that on or about the 8th day of August, 1926, or at any other time or at all, the aforesaid automobile or any automobile of Mary C. Kittredge and/or also known as Mrs. E. H. Kittredge, was maintained and/or managed and/or operated by one Roy Hooper, a chauffeur or otherwise, while in the course of his or any employment as chauffeur or otherwise or at all by the said Mary C. Kittredge and/or also known as Mrs. E. H. Kittredge. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer that portion of Paragraph VIII of said complaint, wherein it is alleged that the said Roy Hooper was operating, managing and maintaining the said Buick automobile at the time of the injuries which caused the death of the said husband of plaintiff, Belva Forrest, and father of plaintiff, Roland Claude Forrest, a minor, and therefore and placing its denial upon that ground denies that the said Roy Hooper was operating and/or managing and/or maintaining the said Buick or any automobile at the time of the injuries or any time or any injury which caused the death of the said husband of plaintiff, Belva Forrest, and/or father of plaintiff, Roland Claude Forrest, a minor, and/or either thereof.

III.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph IX of said complaint wherein it is alleged that said judgment is for the sum of Five Thousand Three Hundred [16] Twenty-four (5,324.00) Dollars, the principal sum, and Nine (9.00) Dollars, costs, and is dated the 22d day of March, 1928; that said judgment remains wholly unsatisfied and unpaid, and said judgment is final and has never been vacated or set aside, and that the time for appeal has expired and that no motion for a new trial is pending therein, and that no appeal has ever been taken therein, and therefore and placing its denial upon that ground denies that said judgment is for the sum of Five Thousand Three Hundred Twenty-four (5,324.00) Dollars or any part thereof, or any sum whatever, the principal sum or otherwise, and/or Nine (9.00) Dollars or any sum at all, costs, and/or is dated the 22d day of March, 1928, or any other time, and/or that said or any judgment remains wholly or at all unsatisfied and/or unpaid, and/or said or any judgment is final and/or has never been vacated, or set aside, and/or that the time or any time for appeal has expired and/or that no motion for a new trial is pending therein, and/or that no appeal has ever been taken therein.

IV.

Defendant denies that in and/or by said or any policy this defendant promised and/or agreed to

pay any judgment obtained against the said Roy Hooper when the loss was made certain by judgment against the said assured after final termination of the litigation and/or otherwise or at all and denies that said Roy Hooper was an assured of this defendant.

V.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XI of said complaint wherein it is alleged that said amount has been made certain by said judgment as herein alleged and the said litigation has finally terminated, and therefore and placing its denial upon that ground denies that said or any amount has been made certain by said judgment or otherwise as herein in said [17] complaint alleged or otherwise or at all, and/or that said or any litigation has finally or otherwise terminated.

VI.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XII of said complaint, and therefore and placing its denial upon that ground denies that an execution has issued against the property of the said Roy Hooper and/or has been returned wholly or at all unsatisfied and/or *nulla bona* or otherwise or at all.

VII.

Defendant denies that under and/or by virtue

of said or any judgment or otherwise or at all this defendant is indebted to plaintiffs or either thereof in the sum of Five Thousand Three Hundred Thirty-three (5,333.00) Dollars or any part thereof or any sum whatsoever.

As and for a second, further, separate, distinct answer and defense defendant alleges as follows:

I.

That under and by the terms of the policy of insurance set forth and referred to in plaintiffs' complaint, it was provided as follows:

> In the event of accident, the assured shall give prompt written notice thereof to the company or to one of its duly authorized agents, and (1) forward to the company forthwith after receipt thereof every process, pleading or paper of any kind relating to any and all claims, suits or proceedings. The assured shall at all times render to the company all co-operation and assistance in his power and, whenever requested, shall aid in securing information and evidence and the attendance of witnesses, and in prosecuting appeals. The assured shall make no settlement of any claim arising hereunder nor incur any expense other than for immediate surgical relief without the written consent of the company. The company shall have the right to settle any claim or suit at its own cost at any time. [18]

That the said Roy Hooper mentioned and referred to in plaintiffs' said complaint did not for-

ward to this defendant forthwith after receipt thereof any process or pleading or paper relating to any or all claims or suits or proceedings but on the contrary the said Roy Hooper wholly failed and neglected to forward to this defendant any process or pleading or paper of any kind relating to said accident or suit or claim or proceeding, and wholly failed and neglected to forward to this company any copy of summons or complaint or to give this defendant any notice of any service upon him of any summons or complaint in that certain action set forth and referred to in plaintiffs' complaint wherein the said Roy Hooper was defendant, nor did the said Roy Hooper ever give to this defendant any notice that any judgment was obtained against him in the said action or in any action, and as defendant is informed and believes and upon its information and belief alleges the fact to be that the said Roy Hooper did suffer a default judgment to be entered in the said action against him without giving any notice thereof or of the service of any summons or complaint upon him therein to this defendant.

That the said alleged assured did not at all times or any time or times, or at all render to this defendant all co-operation and assistance in his power or any co-operation or assistance whatsoever as required under and by the terms of said policy as aforesaid.

II.

That defendant is informed and upon its information and belief alleges the fact to be that the

said Roy Hooper had a good, meritorious and sufficient defense to that certain suit or action set forth and referred to in plaintiffs' complaint and if the said Hooper had notified this defendant of the fact that any summons or complaint therein had been served upon him, or had given or forwarded to this defendant a copy of any summons or complaint [19] so served upon him in said action, or had rendered co-operation or assistance to this defendant, all as required by the said policy of insurance as aforesaid, this defendant could and would have presented the said defense of the said Hooper in said action.

III.

That by reason of the premises and the said failure and neglect of the said Roy Hooper as aforesaid, this defendant was prevented from entering any defense in said action on the part of the said Hooper and was and is greatly prejudiced in its rights under the terms of the said policy of insurance.

WHEREFORE, defendant prays judgment that plaintiffs take nothing by their said complaint and that it be hence dismissed with its costs, and for such other and further relief as to the Court may seem meet and proper.

HARTLEY F. PEART,
Attorney for Said Defendant. [20]

State of California,
City and County of San Francisco,—ss.

R. W. Forsyth, being first duly sworn, deposes and says: My name is R. W. Forsyth; I am an officer, to wit, Pacific Coast Manager of the Indemnity Insurance Company of North America, a corporation, one of the defendants herein, and as such am authorized to and do make this affidavit for and on behalf of said defendant; that I have read the foregoing answer, know the contents thereof, and that the same is true of my own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters I believe it to be true.

R. W. FORSYTH.

Subscribed and sworn to before me this 11th day of February, 1929.

[Seal] DAISY CROTHERS WILSON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 13, 1930. [21]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 11th day of February, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 11, 1930—TRIAL.

This case came on regularly this day for trial, Joseph A. Brown, Esq., appearing as attorney for plaintiff, and Hartley F. Peart, Esq., appearing as attorney for defendant. Thereupon the following named persons, to wit:

* * * * * * * * * * *

twelve good and lawful jurors, were, after examination under oath, duly accepted and sworn to try the issues joined herein. Counsel for defendant moved the Court for leave to file an amendment to the answer herein, and plaintiff objecting thereto, ordered motion denied and exception entered. Counsel made opening statement as to the nature of the case to the Court and jury. Eugene F. Cerqui was sworn and testified on behalf of plaintiff and introduced in evidence an exhibit, which was filed and marked "A." Thereupon the jury was excluded from the courtroom, and defendant moved for an order and judgment of nonsuit, and after arguments of counsel, motion was ordered denied and exception entered. Whereupon the jury returned into court, and the trial was resumed. Robert W. Forsythe and G. R. N. Browne were sworn and testified in behalf of defendant. Defendant introduced in evidence an exhibit, which was filed and marked "B." Another exhibit was filed and marked for identification. A. L. Crawford was sworn and testified on behalf

of plaintiff in rebuttal. The Court, after admonishing the jury, ordered the further trial of this case continued to February 13, 1930, at 10 A. M. [22]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 13th day of February, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 13, 1930—TRIAL (RESUMED).

The parties being present as heretofore, the trial of this case was this day resumed. Joseph Bargas, E. E. Creswell and Mrs. Belva Forrest Dovan were sworn and testified on behalf of defendant and defendant rested. A. L. Crawford was recalled and further testified on behalf of plaintiff, and thereupon plaintiff rested. Defendant then moved the Court for an order discharging the jury, which motion the Court ordered denied and an exception entered. The defendant then moved for a directed verdict in its favor, which motion the Court ordered denied and exception entered. After hearing counsel for defendant, further ordered that the motion of defendant for leave to file amended answer to com-

plaint be and the same is hereby granted. After argument by counsel and instructions of the Court to the jury, the jury retired at 12:10 P. M. to deliberate upon a verdict and returned into court at 12:25 P. M., and upon being asked if they had agreed upon a verdict answered in the affirmative, and presented a written verdict, which was ordered filed and recorded, viz.: "We, the jury in the above-entitled matter, find a verdict in favor of plaintiffs, Belva Forrest and Ronald Claude Forrest, a minor, and against the defendant, Indemnity Insurance Company of North America a corporation, for the sum of Five Thousand Three Hundred Thirty-four Dollars ($5,334.00), together with interest on said sum from the 3d day of May, 1928. Dated: February 13, 1930. John T. Roberts Foreman." Thereupon the Court ordered that judgment be entered in accordance with said verdict and that the jury hereby be and is discharged from further consideration of the case. On motion of counsel for defendant, it is ordered that the execution of said judgment be and is hereby stayed for a period of thirty days. [23]

[Title of Court and Cause.]

BILL OF EXCEPTIONS PROPOSED BY DEFENDANT, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

BE IT REMEMBERED, that on the 11th day of February, 1930, the above-entitled action came on

regularly for trial before the above-entitled court and a jury, the Honorable Frank H. Kerrigan, presiding, the plaintiffs being represented by A. L. Crawford, Esq., and Joseph A. Brown, Esq., and the defendant, Indemnity Insurance Company of North America, a corporation, being represented by Hartley F. Peart, Esq., and Gus L. Baraty, Esq.; and the following proceedings were had, orders made, objections interposed, rulings made by the Court, and exceptions taken, and the proceedings, orders and exceptions hereinafter appearing, had and taken thereon, the following being all of the testimony and evidence offered or introduced on the trial of this cause:

Mr. BARATY.—I now move the Court for permission to file an amended answer on behalf of the defendant.

Mr. BROWN.—This is the first time I have ever heard of this amendment, and we object thereto.

The COURT.—The motion coming as late as it does, it is [24] denied, and an exception noted.

Mr. BROWN.—It is going to be stipulated, your Honor, between counsel, that Belva Forrest and Donald Claude Forrest, a minor child, are the sole heirs of the decedent, and the plaintiffs in this case, and were the plaintiffs in the action brought against Roy Hooper.

Mr. BARATY.—It is so stipulated.

TESTIMONY OF EUGENE F. CERQUI, FOR PLAINTIFFS.

EUGENE F. CERQUI, called as a witness for the plaintiffs, being duly sworn, testified as follows:

Direct Examination.

I am Deputy County Clerk of San Mateo County. I have with me the records in the case of Belva Forrest and Donald Claude Forrest, a minor, by his guardian *ad litem,* against Roy Hooper, et al.

Mr. BROWN.—I would like counsel to stipulate that on the 5th day of May, 1928, a judgment was rendered in the Superior Court of the State of California, in and for the County of San Mateo, in action number 12,406, versus Roy Hooper, for the principal sum of Five Thousand Three Hundred and Twenty-four Dollars ($5,324.00) and Nine Dollars ($9.00) costs, and that execution issued out of the Superior Court of San Mateo County on the 1st day of November, 1928, directed to the Sheriff of the County of San Mateo, and that the Sheriff of the County of San Mateo under his certificate, dated November 15, 1928, duly returned as follows:

> "I, James J. McGrath, Sheriff of the County of San Mateo, do hereby certify that in and by virtue of the within and hereunto annexed writ of execution by me received on the fifth day of November, 1928, I made due search for

(Testimony of Eugene F. Cerqui.)

property upon which I could levy and satisfy said writ and judgment, and I am unable to find any property belonging to the [25] defendant herein named in said City and County, and I herewith return said writ unsatisfied."

Dated Redwood City, the 15th day of November, 1928, and signed James J. McGrath, by E. W. Gallacher, Deputy.

Mr. BROWN.—Will you so stipulate?

Mr. BARATY.—Yes. And, Mr. Brown, let the records show that this execution was issued against the defendant, Roy Hooper, alone.

Mr. BROWN.—Certainly, Roy Hooper alone.

Mr. BARATY.—Yes.

Cross-examination.

Mr. BARATY.—As my cross-examination, I will ask you, Mr. Brown, for a stipulation concerning the remainder of the record.

Will you stipulate, Mr. Brown, that the complaint in the action referred to, that is, number 12,406, in San Mateo County, was filed with the Clerk of the Superior Court of that County on the 13th day of October, 1926, and naming as plaintiffs the plaintiffs who are in this action here, and as defendants Roy Hooper, Mrs. E. H. Kittredge, First Doe and Second Doe, and then there is a change made in the name of Mrs. E. H. Kittredge, naming in her stead Walter Perry Johnson, as executor of the estate of Mary C. Kittredge, deceased—

(Testimony of Eugene F. Cerqui.)

will you stipulate that that complaint was filed on that day?

Mr. BROWN.—Yes, sir.

Mr. BARATY.—Will you also stipulate that on the 11th day of February, 1927, the Superior Court of San Mateo County made an order dismissing the case as far as it concerned Walter Perry Johnson as executor of the estate of Mrs. Mary E. Kittredge, sometimes known as Mrs. E. H. Kittredge, deceased?

Mr. BROWN.—Isn't that immaterial to this case? I will stipulate that it was entered against Roy Hooper alone, because Mrs. Kittredge died, and they could not proceed against her. [26]

Mr. BARATY.—Will you stipulate, Mr. Brown, that a copy of the summons and complaint in that action pending in San Mateo County was served on Roy Hooper in Kern County, this State, on the 28th day of March, 1927?

Mr. BROWN.—We will so stipulate.

Mr. BARATY.—Will you stipulate that a request for the default of Roy Hooper was made by yourself and your associates in the Superior Court of San Mateo County on the 2d day of March, 1928?

Mr. BROWN.—We object to that as incompetent, irrelevant and immaterial and without the issues of the case. We will stipulate to that, your Honor, but we object to it as immaterial, on the grounds that it is immaterial.

The COURT.—Objection overruled; exception.

DEPOSITION OF ROY HOOPER, FOR PLAINTIFFS.

Direct Examination.

The testimony of the witness ROY HOOPER was all received by and through a deposition duly taken by plaintiffs on October 15, 1929.

I reside at Glendale. On August 9th, 1926, I was employed by Mrs. E. H. Kittredge, of Saratoga, as chauffeur. I had been so employed by her continuously since April, 1926, at a monthly salary of $140.00; my employment was discontinued August 11, 1926; I drove a 1926 Master Six Buick Sedan that belonged to Mrs. E. H. Kittredge; I had driven it continuously from the time I entered her employment; I had an accident with this automobile on August 9, 1926, at about 2:30 A. M. at Atherton, when I struck Claude Forrest, the father of this child, and husband of this widow.

There was a license or registry tag in the automobile that showed who the owner of it was and that showed the owner to be [27] Mrs. E. H. Kittredge, as the legal owner of the car. (It was stipulated that Claude E. Forrest was so struck and that he was the father of the child and the husband of this widow in this action.) The car I was driving when I struck the said Claude E. Forrest at Atherton was the Buick Sedan of Mrs. Kittredge of Saratoga, California, and that (it was stipulated that it was the same car and the same employer as the one in question and that it is

(Deposition of Roy Hooper.)

the same Mrs. E. H. Kittredge covered by the policy of insurance introduced in evidence in this case). Mrs. Kittredge was my employer and was the one who employed me to drive the Buick Sedan, and who was paying me the $140.00 for driving the car; the conversation had with her was approximately at 4:30 in the afternoon at her place in Saratoga, and I believe the nurse was present at that conversation; I do not know the name of the nurse when the nurse handed me the package with instructions to deliver it, Mrs. Kittredge was sitting in the library adjoining the living-room; I told Mrs. Kittredge I would return early in the evening before twelve o'clock, if possible; I said I was going to a theater in San Francisco afterwards; I asked her permission to take the Buick Sedan, and thereupon I took the Buick Sedan and went to San Francisco under those conditions; I left San Francisco around twelve o'clock; at the time of the accident I was going south on the State Highway somewhere in the vicinity of Atherton at the time I struck this man, Claude Estell Forrest, and found out afterwards at the hospital in Palo Alto that he was dead.

I saw Mrs. E. H. Kittredge on August 8, 1926, at about 4:30 in the afternoon at her ranch at Saratoga. I had a conversation with her in regard to coming to the city. I think the nurse was present, but I do not remember her name.

Q. State what Mrs. Kittredge there said to you.

Mr. BARATY.—We object as incompetent, ir-

relevant and immaterial [28] and calling for hearsay testimony.

Mr. BARATY.—There is legal situation presented here, your Honor, that has not been established by proof. But Mrs. Kittredge is deceased—died a few months after this accident, and I feel that the fact of her death may put a different complexion on the hearsay testimony that is going to be elicited in this case. Of course, we are in this situation: The defendant also has some hearsay testimony coming from the same source as the plaintiffs. I think it is admissible, and I am rather inclined to think that the plaintiffs' testimony would be admissible, too, by reason of this death, and with that statement, I want to withdraw my objection last made, and ask your Honor to withdraw your ruling and permit the answer to stand. I will withdraw that objection.

Mr. BROWN.—Of course, I am not conceding to any hearsay testimony, *to any hearsay testimony* from Mr. Baraty. I think, if the Court please, the testimony is not hearsay in this sense; Mrs Kittredge is their insured; Roy Hooper is her employee and they are insured, because the conversations with Mrs. Kittredge, both of these being the assured of this company, they are parties before this Court. In a sense the conversations with her, with other people than Roy Hooper, would not be admissible, because we will not be bound by them; but these things are in a different state. The fact of her death, I do not think, makes any difference. Irrespective of the question of her death, I know

(Deposition of Roy Hooper.)

of no principle of law that renders testimony otherwise inadmissible admissible because of the death of the person. The question immediately before your Honor now is not as to conversations. Your Honor will see by referring to line 13, page 18, that it is describing an occurrence.

Mr. BARATY.—In view of Mr. Brown's statement now, I will insist upon the objection.

The COURT.—Objection sustained. [29]

Q. What did she say to you?

A. I asked her permission to go to the city Saturday afternoon at 4:30, and in so doing, I delivered a package handed to me by the nurse—whether it was Mrs. Kittredge's package being sent there or not,—the nurse handed it to me, and I delivered it to the Fairmont Hotel, and I can't say whether it was from Mrs. Kittredge or the nurse.

Mr. BARATY.—I move to strike out the answer as not responsive.

Mr. BROWN.—It is too late to do that now. There has been no objection.

The COURT.—Does the stipulation provide that objections can be taken at the time?

Mr. BARATY.—It was taken by stipulation dictated by Mr. Brown.

Mr. BROWN.—There is no reservation of that kind at all.

Mr. BARATY.—But depositions are taken with reservations.

(Deposition of Roy Hooper.)

Mr. BROWN.—I do not think he can move to strike out the answer at this time, just because of the form of the question.

The COURT.—I will overrule the objection.

WITNESS.—(Continuing.) I told Mrs. Kittredge that I would be back early in the evening, before twelve, if possible, and I said I was going to the theater in San Francisco, and asked her permission to take the Buick Sedan. I drove to San Francisco, and left there about twelve.

Cross-examination.

I was employed by Mrs. Kittredge April 25, 1926, as chauffeur to drive her wherever she wanted to go.

Q. Now, on the 8th day of August, 1926, you say you had a conversation with Mrs. Kittredge at her residence?

A. Yes, I asked her permission to go to the city, and I asked her [30] if I could be released, and if she wanted me for anything else?

Q. Was she a well woman at that time or was she sick?

A. She hadn't been in good health ever since I had been in her employ.

WITNESS.—(Continuing.) Mrs. Kittredge had a Buick Sedan and a Ford Roadster; it was my business to drive the Buick, but not the Ford; on the 8th day of August, 1926, I had a conversation with Mrs. Kittredge at her residence; I asked her permission to go to the city and asked her if I could

(Deposition of Roy Hooper.)

be released and if she wanted me for anything else; it was in the living-room at her house on the ground floor; on that Saturday afternoon I asked her if she *need* me any more for the rest of the day and she said "No"; I asked, "May I go to the city?" and she said "Yes." Previously to that I turned and asked her if it was quite all right to use the Buick and she said, "Yes, but be careful"; then I dressed myself and got into the car and left the ranch for San Francisco. The nurse gave me the package, and I delivered it—whether it was Mrs. Kittredge's or the nurse's friend, I don't know that—they had so many friends, I didn't know one from the other, as far as their names were concerned. I don't know the name of the nurse. The first time I ever saw her was when I came to work there. I don't know her first name; I never heard her called by name. The package the nurse gave me was about six inches long and an inch and a half wide. It was wrapped in regular department store wrapping papers. The nurse was always with Mrs. Kittredge, because Mrs. Kittredge could not see very well. The nurse told me to deliver the package to the Fairmont Hotel, to the address on the package. I don't know the name; I didn't know what was inside the package; I was not told; Mrs. Kittredge did not say what was inside the package.

Q. On this occasion, did Mrs. Kittredge ask you to deliver this package to the Fairmont? [31]

A. It was handed to me by the nurse, and I pre-

(Deposition of Roy Hooper.)

sume the nurse was told by Mrs. Kittredge to do so—Mrs. Kittredge did not tell me.

Q. Mrs. Kittredge did not tell you anything in reference to that package?

A. No. Mrs. Kittredge did not ask me to deliver the package to the Fairmont. Nurse generally gave me all the stuff when it was to be delivered and anything to be taken any place—Mrs. Kittredge left that all to the nurse to take care of. The package was wrapped in regular department store wrapping paper; the nurse gave me the package standing in the living-room door in front part of the house, entering the front yard; the nurse was in the same room with Mrs. Kittredge; she was always with Mrs. Kittredge because she—Mrs. Kittredge—couldn't see very well; the nurse told me to "deliver the package to the Fairmont Hotel, if you will, please." I told Mrs. Kittredge that I would like to go to San Francisco to the theater. I went there because that is where Mrs. Kittredge always kept her car when she was in the city and also when she was at the Stanford Apartments on California Street, and she did all her trading there; my purpose in taking the car there was to leave the car there for the evening. The storage for the car that evening went on Mrs. Kittredge's bill. I did not pay for that.

Q. When you spoke to Mrs. Kittredge, you asked her if you couldn't be released for the day?

A. Yes.

(Deposition of Roy Hooper.)

Q. You told her you were coming to San Francisco?

A. I asked her if I could come to San Francisco.

WITNESS.—(Continuing.) I left the ranch about five o'clock and came direct to San Francisco, arriving about quarter to seven at the Abby Garage, on [32] O'Farrell Street, between Jones and Leavenworth. This was the place Mrs. Kittredge always kept her car. I took the car there and left it for the evening. Then I had dinner and went to Loew Warfield theater alone. I left the show about 11:15; I went to the Abbey Garage, I left the garage, in the machine, and returned to Saratoga, and on the way back, had the accident.

Q. What did you do with this package that the nurse had given you?

A. Delivered it to the Fairmont Hotel.

Q. When? A. That evening.

Q. When about, on the evening?

A. About—I don't know the exact time that I delivered it there.

Q. You haven't any idea what time that evening you delivered the package to the Fairmont Hotel?

A. No.

A. I went up there and turned and came right away from there.

Q. You drove up to the Fairmont Hotel?

A. I got to the city and I went straight up Van Ness to California and over California to Mason and drove in front of the Fairmont and parked and

(Deposition of Roy Hooper.)

delivered the package to the bell-hop and it was delivered by the bell-hop.

Q. You didn't deliver it to the desk clerk?

A. No, hop was standing outside and they usually pick stuff up outside.

Q. You don't know to whom the package was to be delivered?

A. Paid no attention to the name on the package.

Q. Took no receipt for it? A. No.

Q. Didn't know what was in it?

A. No. The first place I went to when I got back to Saratoga was to Joe Bargass' place; he was the foreman for Mrs. Kittredge; he occupied a home separate from the ranch about a mile away. I arrived there about 7:30 or close to 8:00 o'clock in the morning. I stayed at Joe Bargass' place possible one-half hour. [33]

Q. Did you have a conversation with Bargass that morning? A. Told him what happened.

Q. Tell him how the accident happened?

A. Yes.

Q. Do you recall having had a conversation with Mr. Bargass the morning of the accident, between 6:30 and 8:30, at his residence, in which he was present, and in which you were present, and in which you told him about the accident, and at which time you told him you had taken this automobile of Mrs. Kittredge's to San Francisco without her knowledge and consent or permission?

A. No.

(Deposition of Roy Hooper.)

Q. You didn't have any such conversation or made no such statement to Mr. Bargass? A. No.

Q. Do you recall having had a conversation with Bargass at that time and place in which you related of the accident and in which he told you at that time "That's what you get for not having the permission of Mrs. Kittredge to take her car"?

A. No.

Q. You had no such conversation? A. No.

Q. Mr. Hooper, I am going to show you a document—two pages—written on each side of each page, in ink, and dated "Palo Alto, Calif. August 9, 1926," and at the end appears the name "Roy Hooper" and also "Witness: G. R. A. Brown, Jr." —and I will ask you just to examine the document and tell us whether you ever saw that before.

Mr. BROWN.—Let the record show it is on two separate pieces of paper which are not fastened together except with a temporary clip and the signature only appears on the last page, and that it is not in Mr. Hooper's handwriting—any of it—except the signature.

Mr. BARATY.—That's the question I am asking him.

Mr. BROWN.—Shows it isn't his handwriting. [34]

Mr. BARATY.—No, isn't his handwriting, except*ion* the signature.

(Witness handed letter, examining same for some few minutes.)

A. Whoever wrote this letter can sure slip over a

(Deposition of Roy Hooper.)

lot of fake stuff. I don't know anything about that part (witness continuing to examine).

(Question read by the reporter.)

Mr. BARATY.—Did you ever see this document that you have just read over—these two pages, ever see that before? A. I never read it before.

Q. You never read it before? A. No.

Q. Have you ever seen it before?

A. I can't recall that now.

Q. You can't recall that? A. No.

Q. What is your best memory on it?

A. I was there with a man in Palo Alto.

Q. You mean you were there with G. R. A. Brown, Jr., at Palo Alto on that day?

A. I don't know what his name was and I don't know anything about it.

Q. Don't you know the man's name?

A. Don't know anything about him—as far as his name is concerned—I don't know his name at all.

Q. Mr. Hooper, the name "Roy Hooper" at the end of that document, is that or is not that your signature? A. My signature all right.

Mr. BARATY.—We will offer this document to be marked as exhibit for the purpose of identification and offer it in evidence on my cross-examination. And this document is the document that was marked by the notary, and that is the offer we make now.

(Thereupon the document was marked by the notary.)

(Thereupon the document was received in evidence and marked Defendant's Exhibit "A.") [35]

Defendant's said Exhibit "A" is in the words and figures following:

DEFENDANT'S EXHIBIT "A."

"Palo Alto, Calif.
August 9, 1926.

My name is Roy Hooper, my address is care of Mrs. Mary C. Kittredge, Saratoga, California.

On the afternoon of August 7, this year, I asked permission of my employer, Mrs. Mary C. Kittredge, for relief from work from the rest of the day. She granted me this. I did not ask her permission to use either of her two automobiles, and she did not instruct me not to use them. Whether or not she knew I had the Buick automobile, I do not know, except that she knew early Sunday morning when the accident was first reported to her.

I left my employer's place about 4:00 P. M. August 7, 1926, in her Buick car and went to San Francisco in pursuit of my own purposes which consisted of business and pleasure. About 12:30 A. M. August 8, 1926, I left San Francisco to return to Saratoga. My average speed was thirty-five miles an hour. When I last looked at my watch, I had just passed Redwood City, and noted that the time was about 3:00 A. M.

I was approaching the town of Atherton, San Mateo Co., and just as I entered the main intersection (the one that leads to the S. P. Depot), I first noticed two men ahead of me, on foot and on

the pavement approximately five feet from the western edge of the paved portion of the highway. I immediately sounded the horn, and in fact, held my hand on the button for a long time. It sounded loudly and longly. I had slowed down my speed from thirty-five miles an hour to about thirty as I approached the intersection, and after seeing the men, continued at this pace. After sounding my horn, I swerved to the left so that my car was riding upon the center of the Highway. When I first saw these men they [36] were about half a block away. I proceeded, and they made no attempt to get off the highway or out of the way of traffic coming in any direction. When I realized that I was close enough to almost run into them, I again swerved sharply to the left, so that my car was nearly on the eastern edge of the highway. It was just at this juncture that one of the men reeled or lurched in front of the front right fender, and consequently was struck. I believe that if this man had not reeled or lurched that he would not have been hit, and that my efforts to avoid an accident would have been successful. When I brought the car to a stop this man was lying on the center of the highway about one and one-half of my car lengths behind my stopped car. There were no witnesses to the accident, and I took the injured man to the Palo Alto General Hospital. His companion accompanied me, and I might state that he was very much under the influence of alcohol as will Dr. Russel V. Lee, and the Palo Alto Police authorities verify. I first learned of the death of the man who I had

(Deposition of Roy Hooper.)

struck at the Palo Alto General Hospital, shortly after I arrived there, also his name.

I went back to the scene of the accident with a Palo Alto police officer, whom I picked up before going to the hospital; about an hour and a half later. This officer saw my skid marks, and the manner in which the accident occurred, and stated to me that he did not believe the accident could have been my fault.

I arrived back at the ranch about 8:15 A. M. August 8, 1926, after having stayed at Joe Bargass' place (Mrs. Kittredge's foreman) since 6:30 A. M.

I have read the above and it is true to the best of my knowledge and belief.

ROY HOOPER.

Witness: G. R. A. BROWNE, Jr." [37]

Q. The name "Roy Hooper" that appears at the bottom of the writing there is your signature?

A. My signature.

Q. You remember writing your name "Roy Hooper" on that document?

A. I remember that, but I never remember reading it.

Q. You don't remember reading the document?

A. No.

Q. Do you remember having had a conversation wih Mr. G. R. A. Brown, Jr., at Palo Alto on the 9th of August, 1926?

A. Some man there, but I don't recall his name—Brown, Jones, or Smith or what.

(Deposition of Roy Hooper.)

Q. And where was this in Palo Alto your conversation with Mr. Brown or with somebody, who presented this document to you, that we have been speaking about?

A. Some coffee shop down there or confectioner or some restaurant.

Q. In Palo Alto? A. Yes.

Q. Now, did this gentleman tell you that he was from the Indemnity Insurance Company of North America?

A. He was from an Insurance Company. He didn't say "Indemnity Company"—North America, but had nothing to say of Indemnity Company.

Q. Did he tell you he was representing the insurance carrier for Mrs. Kittredge, or words to that effect? A. I believe he did, yes.

Q. Now, did you make a statement to him at that time about the accident and what you had been doing on the day of the accident?

A. I believe I did.

Q. Now, what would you say now as to whether or not you spoke with him about this accident and gave to him any of the facts in reference to the accident and to your actions the afternoon of the accident, after having left Mrs. Kittredge's place?

A. The afternoon after I left Mrs. Kittredge's? [37A]

Q. Yes, afternoon of the accident?

A. I don't get your question.

Q. Did you say anything to him in reference to what you had done the afternoon of the accident

(Deposition of Roy Hooper.)

after you left Mrs. Kittredge's place, and give him any statement of what you had done that evening, and how the accident occurred?

A. Yes, I told him how the accident occurred.

Q. And did you see him write any of your statement down on paper?

A. He was writing something. I didn't know what he was putting on there.

Q. He was having a conversation with you and then he was writing something down? A. Yes.

A. After he got through with his conversation with you at Palo Alto, he presented a document to you, which you signed?

A. Signed that. If I had read it, I wouldn't have signed it.

Q. You wouldn't have signed it?

A. No, not the way it was written.

Q. Why wouldn't you sign it?

A. Because there are a few mistakes.

Q. There are a few mistakes? A. Yes.

Q. I will ask you, Mr. Hooper, if at your conversation with Mr. Brown at Palo Alto on August 9, 1926, you didn't tell him that your name was Roy Hooper and your address was c/o Mrs. Mary C. Kittredge at Saratoga, California, did you tell him that?

A. No, not Mary C.—Mrs. E. H. Kittredge.

Q. Did you tell him at that conversation when you and he were present, "that on the afternoon of August 7th this year (meaning 1926) I asked permission of my employer, Mrs. Mary C. Kittredge,

(Deposition of Roy Hooper.)

for relief from work for the rest of the day. She granted me this." Did you tell him that?

A. She granted me this. I asked permission for the use of the automobile. [38]

Q. Did you tell Mr. Brown at that time and place you had asked Mrs. Kittredge for relief from work for the rest of the day and she granted you relief for the rest of the day? A. Yes.

Q. Did you tell Mr. Brown at that time and place that you did not ask Mrs. Kittredge's permission to use either of her two automobiles and she did not instruct you not to use them? A. No.

Q. Did you not make any such statement to him?

A. No.

Q. Did you make this statement to Mr. Brown at that conversation and at that place, or substantially this statement "whether or not she (meaning Mrs. Kittredge) knew I had the Buick automobile, I do not know, except that she knew early Sunday morning when the accident was first reported to her?" A. No, sir.

Q. Nothing of the kind? A. No.

Q. At the same conversation I will ask you whether or not you made this statement to Mr. Brown, or words substantially the same, "I left my employer's place (Mrs. Kittredge's) about 4:00 P. M. August 7, 1926, in her Buick car, and went to San Francisco, in pursuit of my own purposes which consisted of business and pleasure?"

A. Correct.

(Deposition of Roy Hooper.)

Q. Did you make that statement to Mr. Brown at that time and place? A. Yes.

Q. There is no mistake about it—that statement you made to Mr. Brown?

A. I made a statement to Mr. Brown I left the ranch of Mrs. Kittredge for business and pleasure.

Q. I am asking you if you made this statement, "I left my employer's place about 4 P. M. August 7, 1926, in her Buick car and went to San Francisco in pursuit of my own purposes which consisted of business and pleasure." Did you make that statement? A. No.

Q. You did not make that statement?

A. No. [39]

Q. Now, you have read the rest of the statement with reference as to how the accident happened, Mr. Hooper. Did you substantially make that statement to Mr. Brown at that time as to how the accident happened?

Q. I will read it by paragraph. I will ask you at that time and place you made this statement, or its substance, to Mr. Brown: "I was approaching the Town of Atherton, San Mateo County, and just as I entered the main intersection (the one that leads to the S. P. Depot), I first noticed two men ahead of me, on foot and on the pavement approximately five feet from the western edge of the paved portion of the highway." Did you make that statement? A. Yes.

Q. Now, then, at the same time, did you make this statement: "I immediately sounded the horn, and

(Deposition of Roy Hooper.)

in fact, held my hand upon the button for a long time. It sounded loudly and longly." Did you make that statement in substance? A. Yes.

Q. And at the same time did you make this statement, "I had slowed down my speed from 35 miles an hour to about 30 as I approached the intersection, and after seeing the men continued at this pace"—did you make that statement? A. Yes.

Q. I will ask you if you further made this statement at that time: "After sounding my horn, I swerved to the left so that my car was riding upon the center of the highway. When I first saw these men they were about half a block away." Did you make that statement to Brown at that time?

A. Yes.

Q. I will ask you if you made this further statement to him at that time: "I proceeded, and they made no attempt to get off the highway or out of the way of traffic coming in any direction. When I realized I was close enough to almost run into them, I again swerved sharply to the left, so that my car was nearly on the eastern edge of the highway." Did you make that statement to him? A. Yes. [40]

Q. I will ask you if you made this further statement to him at that time and place: "It was just at this juncture that one of the men reeled or lurched in front of the front right fender, and consequently was struck. I believe that if this man had not reeled or lurched, he would not have been hit and that my efforts to avoid an accident would have been

(Deposition of Roy Hooper.)

successful." Did you make that statement to Mr. Brown at that time? A. Yes.

Q. I ask if you made this further statement to him at that time: "When I brought the car to a stop this man was lying on the center of the highway about one and one-half of my car lengths behind my stopped car. There were no witnesses to the accident, and I took the injured man to the Palo Alto General Hospital." Did you make that statement to Mr. Brown at that time?

A. I made no statement there was no witness. There was one witness.

Q. But otherwise the statement was made by you?

A. There was no witness. There was one witness. He had a friend with him.

Q. You did not tell Mr. Brown there was no witness? A. No.

Q. Now, did you tell him at that time and place, substantially as follows: "His companion accompanied me, and I might state that he was very much under the influence of alcohol as will Dr. Russel V. Lee, and the Palo Alto Police authorities verify"? A. Yes.

Q. You made that statement? A. Yes.

Q. Did you make the next statement: "I first learned of the death of the man who I had struck at the Palo Alto General Hospital, shortly after I arrived there, also his name." You made that statement at that time? A. Yes.

Q. I will ask if you made this statement to Mr. Brown at that time: "I went back to the scene of

(Deposition of Roy Hooper.)

the accident with a Palo Alto police officer, whom I picked up before going to the hospital; about an hour and a half later." Did you make that statement to [41] Mr. Brown at that time?

A. I went back to the scene with a Palo Alto policeman.

Mr. BARATY.—Did you make this statement to Mr. Brown at this time: "This officer saw my skid marks and the manner in which the accident occurred, and stated to me that he did not believe the accident could have been my fault"? Did you make that statement to Mr. Brown at that time?

A. Yes.

Q. I will ask you if you made this statement to Mr. Brown at that conversation: "I arrived back at the ranch about 8:15 A. M. on August 8, 1926, after having stayed at Joe Bargass' place (Mrs. Kittredge's foreman) since 6:30 A. M." Did you make that statement to Mr. Brown at that time?

A. I arrived back at the ranch at 8:15 A. M., August 8, having stayed at Joe Bargass' place—Mrs. Kittredge's foreman—since 6:30? No 6:30 about it. It was nearer 7:30 than anything else.

Q. Nearer 7:30 when you got to his place?

A. Yes.

Q. Was it nearer 8:15 when you got to the ranch?

A. Yes.

Q. Now, on that statement there appears this: I will ask you if you read what I am going to read to you before you signed: "I have read the above and it is true to the best of my knowledge and be-

(Deposition of Roy Hooper.)

lief." Was that statement read by you before you signed it? A. Can't recall ever reading.

Q. Would you say you did not read it?

A. I can't recall ever reading the statement.

Redirect Examination.

Part of my business that night coming to San Francisco was to deliver the package at the Fairmont Hotel.

Q. Had you ever driven either the Buick or Ford car of Mrs. Kittredge to San Francisco prior to the 8th of August, 1926?

Mr. BARATY.—To which we object on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. [42]

Mr. BARATY.—We will note an exception.

Mr. BROWN.—That is the plaintiffs' case.

Mr. BARATY.—The defendant, Indemnity Insurance Company of North America, at this time, your Honor, moves for an order and judgment of nonsuit on the grounds that the evidence produced is not sufficient to meet the allegations of the complaint in this respect:

1. That there is no evidence showing or tending to show that Roy Hooper, at the time of the accident in question, was acting as the agent of Mrs. Mary C. Kittredge.

2. That there is no evidence showing or tending to show that at the time of the accident in question, Roy Hooper, as alleged in the complaint, was driv-

(Testimony of Robert W. Forsyth.)

ing this automobile of Mary C. Kittredge with the permission of said Mary C. Kittredge.

The COURT.—The motion for nonsuit is denied, and exception noted.

TESTIMONY OF ROBERT W. FORSYTH, FOR DEFENDANT.

ROBERT W. FORSYTH, called as a witness for defendant, Indemnity Insurance Company of North America, being duly sworn, testified as follows:

Direct Examination.

I reside in San Mateo. I am manager of the Coast Department of the Indemnity Insurance Company of North America, the defendant in this case. I have access to all of the files in my office concerning the Forrest-Kittredge-Hooper matter. I have delivered these files to you, Mr. Baraty.

Q. Now, Mr. Forsyth, I show you a document here that has come from your files, which purports to be a policy of insurance, all in printed form. Could you tell the Court and jury whether this is a copy of the policy in question here—that is to say, that as an addition to the document that I am showing you, the original of which was delivered to Mrs. Kittredge, her name appeared as assured, [43] the Buick car in question was mentioned in the policy, and it was duly signed by the officers of your company, and in force and effect on the sixth day of August, 1926, the day of this accident?

(Testimony of Robert W. Forsyth.)

A. Yes, sir.

Q. Would you say that this is a correct copy of that policy? A. Yes, sir.

Mr. BARATY.—Now, with these amendments, your Honor, we would like to offer this in evidence as the policy in question here, which will be supplemented by adding the name of the assured, Mrs. E. H. Kittredge, the Buick car in question here, and the signatures of the officials of this company, and the stipulation by us that it is the policy that was in force and effect on the day in question, and ask that it be marked Defendant's Exhibit "B."

The said document referred to was received in evidence and marked Defendant's Exhibit "B."

Said Defendant's Exhibit "B" was in the words and figures following:

DEFENDANT'S EXHIBIT "B."

"Automobile Policy.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

PHILADELPHIA.

A Stock Company.

(Hereinafter called the Company)

HEREBY AGREES WITH THE ASSURED

Named in the Declarations attached hereto and hereby made a part hereof, as respects bodily injuries (or death resulting at any time therefrom) and property damage accidentally suffered or al-

leged to have been suffered by any person or persons during the term of this Policy, resulting from the ownership, maintenance or use, including loading or unloading, of any of the automobiles described in the Declarations, at any location within the United States of America or the Dominion of Canada, and also as respects direct loss or damage to any such automobile or automobiles when accidentally sustained within said territorial limits, as follows: [44]

SECTION A. Public Liability. Provided specific premium charge is made in Section A, Item 1, of the Declarations:

TO PAY, within the limits specified in the Declarations, any loss by reason of the liability imposed by law upon the Assured for such bodily injuries or death so resulting;

TO DEFEND, in the name and on behalf of the Assured, all claims or suits for such injuries for which the Assured is, or is alleged to be, liable;

TO PAY all costs and expenses incurred with the Company's written consent;

TO PAY all court costs taxed against the Assured in any such suit;

TO PAY all interest accruing upon any judgment in any such suit up to the date of the payment or tender to the judgment creditor, or his attorney of record, of the amount for which the Company is liable;

TO REPAY to the Assured the expense incurred in providing such immediate surgical relief as is imperative at the time of the accident.

SECTION B. Property Damage. Provided specific premium charge is made in Section B, Item 1, of the Declarations:

TO PAY, within the limits specified in the Declarations, any loss by reason of the liability imposed by law upon the Assured for such damage or destruction of property of every description (excluding property of the Assured or property in the custody of the Assured for which the Assured is legally responsible, or property carried in or upon any automobile of the Assured), including loss of use of such property damaged or destroyed;

TO DEFEND, in the name and on behalf of the Assured, all claims or suits for such damage for which the Assured is, or is alleged to be, liable;

TO PAY all costs and expenses incurred with the Company's written consent;

TO PAY all court costs taxed against the Assured in any such suit.

TO PAY all interest accruing upon any judgment in any such suit up to the date of the payment or tender to the judgment creditor, or his attorney of record, of the amount for which the Company is liable.

SECTION C—Collision. Provided specific premium charge is made in Section C, Item 1, of the Declarations:

TO PAY to the Assured the actual loss incurred during the term of this Policy, not exceeding the actual cost of suitable repair or replacement, by reason of damage to or destruction of any automobile or automobiles described herein, including operating

equipment while attached thereto, if caused solely by accidental collision with another object, either moving or stationary, excluding, however, damage or destruction by fire from any cause whatsoever.

It is agreed that the amount deductible as stated in Section C, Item 1, of the Declarations shall be deducted in the case of every collision from the amount of damage sustained.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

Additional Assured. A. It is hereby understood and agreed, unless limited by endorsement attached hereto, that this Policy is extended to cover as additional Assured any person or persons [45] while riding in or legally operating any automobile described in the Declarations and any person, firm or corporation, legally responsible for the operation thereof (exception always a public garage, automobile repair shop and/or sales agency and/or service station and agents and employees thereof) provided such use or operation is with the permission of the named Assured or, if the named Assured is an individual, with the permission of an adult member of the Assured's household other than a chauffeur or domestic servant; but in no event shall the extension of insurance herein provided be considered to apply to an automobile operated for the transportation of passengers for hire, or to cover the purchaser of any automobile described herein if sold, or a transferee or assignee of this Policy except by the direct consent of the Company in the manner indicated in Condition H. of this policy.

Limitation of Liability. B. The liability of the Company under this Policy is limited as expressed in Item 1 of the Declarations which limits shall apply however to each automobile covered hereunder, and the limits shall not apply to the cost of defense of claims or suits, court costs, interest accruing upon any judgment as above limited or the cost of immediate surgical relief, as provided for herein.

Exclusions. C. This Policy shall not cover in respect of any automobile: (1) while driven or manipulated in any race or speed test; (2) while driven or manipulated by any person under the age fixed by law or under the age of sixteen years in any event; (3) while being used for towing or propelling any trailer or any vehicle used as a trailer. This Policy does not cover: (a) any liability of the Assured to any employee of the Assured while engaged in the maintenance or use of any automobile; (b) any liability voluntarily assumed by the Assured; (c) any liability imposed by any workmen's compensation law or agreement; (d) any loss under Section C of this Policy resulting from damage to or destruction of any tire due to puncture, cut, gash, blowout or other ordinary tire trouble and excluding in any event damage to or destruction of tires unless caused by an accidental collision which also causes other damage to or destruction of the insured automobile.

Notice and Settlement. D. In the event of accident, the Assured shall give prompt written notice thereof to the Company or to one of its duly author-

ized agents, and (1) forward to the Company forthwith after receipt thereof every process, pleading or other paper of any kind relating to any and all claims, suits or proceedings. The assured shall at all times render to the Company all co-operation and assistance in his power, and whenever requested, shall aid in securing information and evidence and the attendance of witnesses, and in prosecuting appeals. The Assured shall make no settlement of any claim arising hereunder nor incur any expense other than for immediate surgical relief without the written consent of the Company. The Company shall have the right to settle any claim or suit at its own cost at any time. (2) In the event of disagreement as to the extent of damage to or destruction of any insured automobile the loss may be determined by two appraisers, one chosen by the Assured and one by the Company. The two appraisers, if unable to agree, may select a third. The award in writing of two appraisers shall determine the loss, damage or repairs. The Company and the Assured shall pay the appraiser respectively selected by each and shall bear equally the other expenses of the appraisal and of the third appraiser if one is selected. The Company may accomplish any repairs determined by the appraisers [46] by such means as it may select, or at the option of the Company, may replace the automobile (or its equipment) or pay in money the amount of loss or damage determined by the appraisers. The Company shall have reasonable time and opportunity to examine any damaged automobile (or its equipment) before re-

pairs are undertaken or physical evidence of the damage is removed, but the Assured shall not be prejudiced by any act on his part or in his behalf undertaken for the protection or salvage of the damaged automobile (or its equipment).

Cancellation. E. This policy may be cancelled at any time at the request of the Assured, or by the Company, upon written notice to the other party, stating when thereafter cancellation shall become effective, and the date of cancellation shall then be the end of the Policy period. If such cancellation is at the Company's request, the earned premium shall be computed and adjusted *pro rata.* If such cancellation is at the Assured's request, the earned premium shall be computed and adjusted at short rates in accordance with the table printed hereon. Notice of Cancellation mailed to the address of the Assured as given herein shall be sufficient notice, and the Company's check, similarly mailed, a sufficient tender of any unearned premium.

Special Statutes. F. If any of the terms or conditions of this Policy conflict with the law of any State in which coverage is granted, such conflicting terms or conditions shall be inoperative in such State in so far as they are in conflict with such law. Any specific statutory provision in force in any State in which coverage is granted shall supersede any condition of this Policy inconsistent therewith.

Subrogation. G. The Company shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all the Assured's

rights of recovery therefor against any party or other entity.

Assignment. H. No assignment of interest under this Policy shall bind the Company unless its consent shall be endorsed hereon.

Changes. I. No condition or provision of this Policy shall be waived or altered, except by endorsement attached hereto, signed by the President, a Vice-President, Secretary or an Assistant Secretary of the Company, nor shall knowledge possessed by any Agent or by any other person be held to effect a waiver or change in any part of this contract. Changes in the written portions of the Declarations may be made by the Agent countersigning this Policy, such changes binding the Company when initialed or signed by such Agent.

Bankruptcy. J. In the event of the bankruptcy or insolvency of the Assured, the Company shall not be released from the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency. If, because of such bankruptcy or insolvency an execution against the Assured is returned unsatisfied in an action brought by the injured, or by another person claiming by, through or under the injured, then an action may be maintained by the injured, or by such other person against the Company under the terms of this Policy for the amount of the judgment in said action, not exceeding the amount of this Policy.

Acceptance. K. The Assured by the acceptance

(Testimony of Robert W. Forsyth.)

of this Policy declares the several statements in the Declarations to be true, and this Policy is issued in consideration thereof and of the [47] payment of the premium.

IN WITNESS WHEREOF, the INDEMNITY INSURANCE COMPANY OF NORTH AMERICA has caused this Policy to be signed by its President and Secretary at Philadelphia, Pennsylvania, and countersigned by a duly authorized Agent of the Company.

Countersigned: ————————————,

Agent."

Q. Mr. Forsyth, I will show you a document and just ask you to familiarize yourself with it (counsel handing a paper to the witness). Now, was that document among the papers given to me?

A. Yes.

Q. And in the file in the Forrest-Kittredge case in your office? A. Yes.

Q. And does it bear the marks relative to your establishment?

A. Yes. It says here, "Sent to Home office," with date and the initial.

Q. And that is the manner that assists you to identify it? A. Yes, one of our stamps.

Mr. BARATY.—Now, your Honor, we desire to offer this document in evidence.

Mr. BROWN.—It is objected to on the grounds that it is immaterial and incompetent evidence and hearsay, and not binding on us in any way.

Mr. BARATY.—The purpose of it, your Honor, is to show that Mary C. Kittredge, in her lifetime, complied with the provisions of the policy by notifying this defendant insurance company of the occurrence of an accident and giving her views as to what she knew about the case. It substantiates our defense in this case that we do not consider ourselves liable to the plaintiff here in this action. Now, that is one of the chain of circumstances that makes for our defense.

The COURT.—The objection is sustained and an exception is noted.

The COURT.—It may be admitted as Defendant's Exhibit "C" for identification. [48]

Said Defendant's Exhibit "C" for identification is in the words and figures following: (Here insert Defendant's Exhibit "C" for identification.

DEFENDANT'S EXHIBIT "C" FOR IDENTIFICATION.

Sent to Home Office—
Date 5-2-27.
B.

Saratoga, Sept. 26, 1926.

Indemnity Insurance Co. of N. America:
Gentlemen:

Referring to the accident in the early part of August when the unfortunate death of a pedestrian occurred through being hit by my Buick sedan while being driven by Roy Hooper, the fact is that the car was being used by him that night without

(Testimony of Robert W. Forsyth.)

my knowledge or permission. As I learned after the accident, he took the car secretly and drove from Saratoga to San Francisco for his own private purposes entirely; and it was while he was on his way back to Saratoga in the early hours of the morning that the accident occurred. He was allowed to have Saturday nights free as a rule; and was in the habit of going those evenings to San Jose. For that purpose he had general permission to use a Ford runabout; but his express instructions were that he should never use the Buick sedan without first obtaining special permission. On the evening in question he took the car without permission, nor did I know that he had taken it until I was informed of the accident on the following day. Neither did I know of any intention on his part to go to San Francisco.

MARY C. KITTREDGE.

Witness:

W. P. JOHNSON.

[Endorsed]: United States District Court. No. 18,331. Forrest vs. *Indem.* Deft. Exhibit No. "C" for Iden. Filed 2/11/30. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

WITNESS.—(Continuing.) I knew of the existence of the action referred to that was pending in San Mateo County, and which has been mentioned in this case, in which Mrs. Forrest and her son were plaintiffs and the Indemnity Insurance Company of North America, and Roy Hooper and

(Testimony of Robert W. Forsyth.)

others, were defendants. I knew of the existence of that suit, because the papers in that suit were forwarded to us by the assured, Mrs. Kittredge. That is the action that was afterwards dismissed as against Mrs. Kittredge on account of her death.

Q. Were you ever notified by Roy Hooper, the chauffeur that process had been served upon him in the action pending in San Mateo county?

A. No.

Cross-examination.

Q. Mr. Forsyth, weren't you informed of the pendency of this suit and the service of this summons on Hooper by Mr. Baraty and the fact that he had been notified by Mr. Crawford and myself that this suit had been started and served upon Hooper and asking Mr. Baraty whether he wanted to appear on behalf of the company, and didn't Mr. Baraty communicate that to you?

Mr. BARATY.—That is objected to as incompetent, irrelevant and immaterial, it makes no difference at all. Mr. Baraty is not the defendant corporation.

The COURT.—Objection overruled; exception noted.

(By Mr. BROWN.)

Q. Will you answer the question?

A. I have no recollection of it.

Q. Do you mean to say that you can't recollect Mr. Baraty having explained to you about the fact that we served the summons on Hooper?

A. No. I have no recollection of it.

(Testimony of Robert W. Forsyth.)

Q. Don't you remember further that you told Mr. Baraty to inform [49] us that the company was not interested in the matter? A. No.

Q. And we also gave Mr. Baraty Mr. Hooper's address and told him that no default would be entered in this case? We gave him every opportunity to defend? You just don't remember that?

A. No, I don't.

TESTIMONY OF G. R. A. BROWN, JR., FOR DEFENDANT.

G. R. A. BROWN, Jr., called as a witness for defendant Indemnity Insurance Company of North America, being duly sworn, testified as follows:

Direct Examination.

I reside in San Francisco. At present I am not employed. I was formerly employed by the defendant, the Indemnity Insurance Company of North America, in the capacity of claims adjuster and investigator of automobile accidents. In that capacity I investigated the Hooper-Forrest accident. As soon as I was advised that the accident had taken place—I believe it was the next day—I went to Saratoga to where Mrs. Kittredge lived, and she related the facts of the accident to me in so far as she knew them.

I first saw Roy Hooper in connection with this accident at the coroner's inquest at Palo Alto, but I did not have any conversation with him until after

(Testimony of G. R. A. Brown, Jr.)

the inquest. I arrived at the inquest during the latter part of his testimony. After the inquest had concluded I wanted to get Roy Hooper's version of the accident, and all the details concerning it, so I asked him if he would go with me to some place where we could talk it over. We did not want to stand on the street and talk, so we went to Wilson's Candy Store. I drew a diagram of the accident. There was no one else with us during our conversation that afternoon.

I told Roy Hooper what my name was and that I was representing the Indemnity Insurance Company of North America, who was the [50] company that insured his employer, Mrs. Kittredge's automobile, and that as a representative of that company I wanted him to give me the facts of the case. He gave me a statement. That statement was transcribed into longhand writing. I did not urge him or make any threats. I asked him how the accident occurred, and he explained it to me, and after he got through explaining how it happened, I said, "We had better write it down in longhand so we can have something in black and white, a definite memorandum of the same in the form of a statement," and I said, "I will write the statement out in my own hand, because possibly I can express the case a little better than you can. I am accustomed to do this particular thing. I will write it out as you tell me." And this is what I took down. He practically dictated it to me. He dictated the facts and details and I wrote them

(Testimony of G. R. A. Brown, Jr.)

down. This writing was done in Wilson's Candy Store at Palo Alto.

Q. I will show you a document, and it is in evidence here and marked Defendant's Exhibit "A," and I will ask you if you ever saw that document before? (Counsel handing a document to the witness.) A. Yes, I saw it; I wrote it myself.

Q. Is that the document that you have been referring to, that was written out at Wilson's Candy Store?

A. That is the document. All the writing, with exception of the signature, Roy Hooper, is mine, with the exception of his initials on the first page.

Q. And the name Roy Hooper, who affixed that name to the document? A. Roy Hooper.

Q. Himself? And on the reverse side of the first page, down at the bottom there appear some initials. Can you say what initials those are?

A. Those initials are R. O. H., representing his name, Roy O. Hooper,

Q. Who put them there?

A. He did, at my request, in my presence. [51]

Q. Yes. Now, what was done in connection with his signature? Was the document read to him, or did he read it there himself?

A. Well, as I said before, he dictated the facts of the case to me. I just—what I have written down there, except that I might have worded it differently, in different phraseology and used better grammar than he would have used, and then I asked him after I had finished writing it if he would read

(Testimony of G. R. A. Brown, Jr.)

it over and see if any mistakes had been made by me, and if it was correct in every detail as far as he knew, and to take note of the last paragraph, which says, "I have read the above and it is true to the best of my knowledge and belief." And after that he signed his name to it and so did I.

Q. Now, will you please read that document to the Court and jury?

A. "Palo Alto, Calif., August 9, 1926. My name is Roy Hooper, my address is care of Mrs. Mary C. Kittredge, Saratoga, California.

"On the afternoon of August 7th this year I asked permission for the rest of the day. She granted me this. I did not ask her permission to use either of her two automobiles, and she did not instruct me not to use them whether or not she knew I had the Buick automobile, I do not know, except that she knew early Sunday morning when the accident was first reported to her.

"I left my employer's place about 4:00 P. M. on August 7, 1926, in her Buick car and went to San Francisco in pursuit of my own purposes which consisted of business and pleasure. About 12:30 A. M. August 8, 1926, I left San Francisco to return to Saratoga. My average speed was thirty-five miles an hour. When I last looked at my watch, I had just passed Redwood City, and noted that the time was about 3:00 A. M.

"I was approaching the town of Atherton, San Mateo Co., and just as I entered the main intersection (the one that leads to the S. P. Depot) I first

(Testimony of G. R. A. Brown, Jr.)
noticed two men ahead of me, on foot and on the pavement, approximately five feet from the western edge [52] of the paved portion of the highway. I immediately sounded the horn, and in fact, held my hand upon the button for a long time. It sounded loudly and longly. I had slowed down my speed from thirty-five miles an hour to about thirty as I approached the intersection, and after seeing the men continued at this pace. After sounding my horn, I swerved to the left so that my car was riding upon the center of the highway. When I first saw these men they were about half a block away. I proceeded, and they made no attempt to get off the highway or out of the way of traffic coming in either direction. When I realized that I was close enough to almost run into them, I again swerved sharply to the left, so that my car was nearly on the easterly edge of the highway. It was just at this juncture that one of the men reeled or lurched in front of the front right fender, and consequently was struck. I believe that if this man had not reeled or lurched that he would not have been hit, and that my efforts to avoid an accident would have been successful. When I brought the car to a stop this man was lying on the center of the highway about one and one half of my car-lengths behind my stopped car. There were no witnesses to the accident, and I took the injured man to the Palo Alto General Hospital. His companion accompanied me, and I might state that he was very much under the influence of alcohol as will Dr. Russell V.

(Testimony of G. R. A. Brown, Jr.)

Lee, and the Palo Alto police authorities verify. I first learned of the death of the man who I struck, at the Palo Alto General Hospital, shortly after I arrived there, also his name.

"I went back to the scene of the accident with a Palo Alto Police officer, whom I picked up before going to the hospital, about an hour and a half later. This officer saw my skid marks, and the manner in which the accident occurred, and stated to me that he did not believe the accident could have been my fault.

"I arrived back at the ranch about 8:15 A. M. August 8, 1926, [53] after having stayed at Joe Bargass' place (Mrs. Kittredge's foreman) since 6:30 A. M.

"I have read the above and it is true to the best of my knowledge and belief." Signed, Roy Hooper, and witnessed by myself.

Q. Your name? A. G. R. A. Browne, Jr.

Q. What is your memory now as to the statement there given to you by Hooper? Are those the facts given to you by Hooper?

A. Oh, yes, sir, those are the facts given to me by Hooper. Right after the inquest.

WITNESS.—(Continuing.) I saw Mrs. Mary C. Kittredge, the afternoon of the day the accident occurred. The accident happened about three o'clock in the morning, and I saw her the same afternoon at her home in Saratoga. That was before I had had my interview with Roy Hooper.

(Testimony of G. R. A. Brown, Jr.)

Q. What did she say to you, if anything, concerning the accident that occurred on the 8th day of August, 1926?

Mr. BROWN.—Objected to as immaterial and hearsay and not binding on us.

The COURT.—Sustained; exception noted.

Mr. BARATY.—Will you stipulate, Mr. Brown, that Mrs. Mary C. Kittredge died on the 20th day of October, 1926?

Mr. BROWN.—We will so stipulate.

Mr. BARATY.—I would like to renew the last question.

Mr. BROWN.—We will repeat the same objection, and on the same ground.

The COURT.—Same ruling and exception.

Q. You had a conversation with Mrs. Kittredge the same day of the accident? A. Yes.

Q. What did Mrs. Kittredge say to you—what did she say to you in the conversation held by yourself with her at her premises on [54] the day of the accident, concerning the matter of her automobile, or whether she gave Roy Hooper permission to use the car, for her or for himself?

Mr. BROWN.—Same objection on the same ground.

The COURT.—Sustained; exception noted.

WITNESS.—(Continuing.) I left the employment of the Indemnity Insurance Company of North America, about the month of January, 1927. I do not recall exactly, but it was about six months after the accident.

(Testimony of G. R. A. Brown, Jr.)

Cross-examination.

When I took this statement I was a salaried employee of the insurance company; and it was part of my duties to take statements generally in all accidents. And to take these statements from all the witnesses and reduce them to writing, and return them to the insurance company. In these statements I employed my own language, and in this statement, I used such phraseology as I thought would express the facts better than Mr. Hooper's language, and I wrote down what he stated, and I wrote down what to my mind stated, expressed and conveyed the idea that he wanted to convey, in better language.

Now, then, Mr. Browne, did you observe that apparent outstanding inconsistency in the statement that Mr. Forrest, the deceased, was walking down the highway with a companion, and also immediately following that statement that there were no witnesses to the accident?

A. Yes, I observed that, because right after I wrote the statement in, I said, "Where is the companion that was with him?"

Q. But you left the statement in there nevertheless that there were no witnesses to the accident, didn't you? A. Yes, I did; not intentionally, yes.

Redirect Examination.

Mr. BARATY.—What did Roy Hooper say to you in reference to his [55] having the automobile at the time in question, whether he had permis-

(Testimony of G. R. A. Brown, Jr.)

sion or whether it was his work or Mrs. Kittredge's work that he was doing at the time?

A. He told me in Wilson's Candy Store that he took the machine on his own accord, or responsibility, without asking her for it, and that his employer did not know he had the Buick Sedan.

Recross-examination.

(By Mr. BROWN.)

Q. Now, then, Mr. Browne, have you got in that statement anything to the effect that he took the automobile? Let's see the statement. You have in that statement this language: "She granted permission to take it." You have that in here. Mrs. Kittredge granted the permission to take it that day. A. Got it at four o'clock, and—

Q. And that he did not ask her permission to use the car and he didn't know whether she knew it or not? A. That is true.

Q. But he didn't tell you that he used it of his own accord and of his own volition? Did he use those words?

A. He didn't use the words "accord and volition." He said he took the car.

Q. What he did say, according to your best recollection, is what you have written down here?

A. I remember what he told me. He told me so much as I have written down.

Q. That is your own language, the thought that was conveyed to your mind in describing what he said to you? A. That is quite right.

(Testimony of G. R. A. Brown, Jr.)

Q. You think that he used of his accord and volition? A. Yes.

Mr. BARATY.—If the Court please, we have Judge Walter Perry Johnson under subpoena.

Mr. BROWN.—What do you expect to prove by him? Maybe we can dispose of that. [56]

Mr. BARATY.—I want to prove by Judge Walter Perry Johnson that the policy in question was in his possession, as executor of his sister's estate, Mrs. Mary C. Kittredge, deceased, and was destroyed by him, at the termination of the estate proceedings.

Mr. BROWN.—All right. We will stipulate as to that.

Mr. BARATY.—And I want to prove by the same witness that Defendant's Exhibit "C" for identification is in his handwriting.

Mr. BROWN.—I will stipulate to that.

Mr. BARATY.—I want to prove by the same witness that the handwriting of this entire document (Defendant's Exhibit "C" for identification), other than that of Mary C. Kittredge, is in the handwriting of Judge Walter Perry Johnson, and that the signature, "Mary C. Kittredge" is in the handwriting of Mary C. Kittredge, and that the said Mary C. Kittredge is the Mrs. Kittredge in the policy in question.

Mr. BROWN.—We will stipulate to that, too.

Mr. BARATY.—Will you further stipulate that

(Testimony of Joseph Bargass.)

Judge Walter Perry Johnson is the brother of Mary C. Kittredge, and was executor of her estate?

Mr. BROWN.—We will stipulate.

TESTIMONY OF JOSEPH BARGASS, FOR DEFENDANT.

JOSEPH BARGASS, called as a witness for defendant, Indemnity Insurance Company of North America, being duly sworn, testified as follows: [57]

Direct Examination.

I reside at Saratoga, Santa Clara County, and have lived there a little over thirty years. I used to be ranch foreman. Now I am assisting my wife and mother-in-law in running a boarding place there. I knew Mary C. Kittredge; I worked for her for about thirty years, up to the time of her death. I started in by doing gardening and driving for her, and then later on I had charge of the whole ranch.

I knew Roy Hooper, the chauffeur. I remember the occasion of the accident that he had with the Buick automobile. At that time I was working for Mrs. Kittredge as foreman of her ranch; the ranch was west of Saratoga, about three-quarters of a mile up on the sidehill, adjoining Senator Phelan's ranch. At that time and at the time of the accident in question, here, I lived down at our own place in Saratoga, about three-quarters of a mile away from the ranch.

(Testimony of Joseph Bargass.)

I remember seeing Roy Hooper on the day of this accident, that is, that morning, in the neighborhood of 5:00 o'clock in the morning.

Q. What happened?

A. Well, I was not up yet. It was Sunday morning, and then I heard a car running out of the yard. Of course, there were guests in the building, and I wondered who was out there, and my brother-in-law from Vallejo happened to get up, and he said there was a young fellow out there who wanted to see me. I said, "Who is he?" He said, "I don't know." So I dressed up and went out. I told him to drive down behind the garage and shut off the engine, because I did not want him to have the car running and disturbing people, so he went down with the car behind the garage and I went down there, and he looked very pale.

Q. Who looked very pale?

A. Hooper, and I says, "What is the matter?" and he said how he was in trouble, and I said, [58] "Well, what is the matter?" and he says—he said he had killed a man, and I said, "How did that happen?" and I says—I says, "Well, did Mrs. Kittredge know you took that car?" and he said, "No. That is what is bothering me." And I said, "That is bad policy." I said, "That is always the time when a person takes a machine that way without asking the owner, you always get into trouble." Well, he was worrying about the matter, why it happened, so he remained there for, oh, I should judge about an hour or so.

(Testimony of Joseph Bargass.)

WITNESS.—(Continuing.) From my house he went up to the ranch, and when I got there the matter had already been reported to Mrs. Kittredge.

Roy Hooper did not say anything to me about having delivered a package for Mrs. Kittredge. When I told him, "That is what you get for taking a car without permission," he just kind of mumbled; he didn't say anything, he was very pale and kind of nervous; I could not get much out of him.

Cross-examination.

I think I remember Mr. Crawford, I do not know his name, coming to see me on the 20th of October, 1929, down at my place. He talked with me about what occurred at the time Mr. Hooper came back from the accident.

Q. Did you tell Mr. Crawford at that time and place that you did not know what Roy Hooper meant when he said he didn't want Mrs. Kittredge to know about the accident?

A. I do not remember of saying that.

Q. Would you say you did not say that to him?

A. I do not remember saying that to him.

Q. You just don't remember?

A. Yes, I do not remember; I do not know that I did. [59]

TESTIMONY OF E. E. CRESSWELL, FOR DEFENDANT.

E. E. CRESSWELL, called as a witness for defendant, Indemnity Insurance Company of North America, being duly sworn, testified as follows:

Direct Examination.

At the present time, and for some time prior to August, 1926, I have been the Pacific Coast Claim Manager of the Indemnity Insurance Company of North America, the defendant in this action. I am familiar with the action pending in San Mateo County, entitled Belva Forrest et al. against Kittredge and Hooper.

Subsequent to the service of process in that action upon Roy Hooper, Roy Hooper did not ever confer with me; at no time. He never delivered to me a copy of the process in that San Mateo action.

Now, you know Mr. Crawford, one of the attorneys for the plaintiffs here? A. Yes, I do.

Q. Do you know any conversations, and by that I mean more that one, relative to the fact that Hooper had been served in the San Mateo action, and the request by Mr. Crawford upon you and through your company that they were defending for Hooper? A. No, I do not.

Q. You do not remember any such a conversation? A. No, I do not.

Q. Mr. Crawford has been in your office?

A. Yes, he has, on other matters though, as I recall. [60]

TESTIMONY OF MRS. BELVA FORREST, FOR DEFENDANT.

BELVA FORREST, called as a witness for defendant, Indemnity Insurance Company of North America, being duly sworn, testified as follows:

Direct Examination.

(By Mr. BARATY.)

Q. What is your name, Madam?

A. Mrs. Belva Forrest.

Q. Is that your name now?

A. My name is Belva Dovan.

Q. Now, so that there may be no misunderstanding, did you just tell the Clerk that your name was Belva Forrest? A. Yes, sir.

Q. Now, your testimony is that your name is Belva Dovan? How do you spell that?

A. D-o-v-a-n.

Q. So that you are now married again?

A. Yes.

Q. And your husband's name is what?

A. John Dale Dovan.

Q. And you are living with him now as man and wife? A. I am.

Q. And what is his occupation?

A. He works for the Shell Oil Company.

Q. And where do you reside with him?

A. In Martinez.

Q. And how long have you been married to Mr. Dovan?

(Testimony of Mrs. Belva Forrest.)

A. We were married on July 12, of this year—of last year.

Q. Of 1929? A. Yes.

Mr. BARATY.—That is all.

Mr. BARATY.—Now, your Honor, in view of this testimony I would like to ask the Court for permission to inquire of the gentlemen of the jury whether any of them are acquainted with the lady's husband, or if any of them are in any way connected with the concern with which he is doing his work. I say that in the light of the situation that we have been laboring under the impression that the lady's name was Forrest, and that an opportunity to quiz the jury as to her present husband is, of course, not before us. [61]

The COURT.—The motion is denied, and exception noted.

Mr. BARATY.—The defendant rests.

TESTIMONY OF A. L. CRAWFORD, FOR PLAINTIFF (IN REBUTTAL).

A. L. CRAWFORD, being called as a witness for plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct Examination.

I am an attorney at law, practicing since 1917 in San Francisco and Palo Alto. I am one of the attorneys for the plaintiff in this case and was one of the attorneys for the plaintiff in the case of Forrest et al. vs. Hooper and Mrs. Kittredge. I re-

(Testimony of A. L. Crawford.)

member about the time that Mr. Hooper was served with summons here in this city and county.

Q. Did you have any conversation within three or four days after the service of summons on Roy Hooper, with Mr. Gus L. Baraty, one of the attorneys of record in that case?

Mr. BARATY.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled; exception noted.

A. I did.

WITNESS.—(Continuing.) At that conversation besides myself and Mr. Baraty, there was present Mr. Joseph A. Brown, one of the attorneys for the plaintiffs in this case, and the conversation took place on the 4th floor of the City Hall.

Q. What was that conversation.

Mr. BARATY.—We object to the question on the ground that it is incompetent, irrelevant, and immaterial.

The COURT.—Objection overruled; exception noted.

A. The conversation at that time between myself and Mr. Baraty and yourself was to the effect that we had served Hooper about the thirtieth day of January, 1928, and we [62] told him the incident surrounding the serving of Mr. Hooper and how it had taken such a long time to get in touch with Hooper. At that time I told Mr. Baraty that Mr. Hooper could be reached through 585 Geary Street, Hotel Heuer, this city. And that, further-

(Testimony of A. L. Crawford.)

more, we thought that he was then at Mills Field, and that we would do all in our power to assist in the matter and told Mr. Baraty to take it up with the company.

Q. And what did he say?

A. Mr. Baraty said at that time that he was not interested in litigation and was not providing business for himself. I believe that was the term. That was the substance of the conversation.

Q. But he said that he would take it up with the company? A. He did, also.

Q. And in the meantime no action was taken?

A. There was no action taken at that time.

Q. Did you see Mr. Baraty again before this default was entered?

A. Yes, I saw Mr. Baraty again.

Q. Do you remember where that was.

A. It was in the courtroom of what I believe is now the courtroom of Justice of the Peace Cornelius Kelly.

Q. That was on the third floor of the City Hall?

A. That was on the third floor of the City Hall, this city and county. At that time I again reminded Mr. Baraty, and asked him what he was going to do, and I told him that we had taken default of Mr. Hooper, but that we would give him ample opportunity to search plenty.

Q. Was anything said about what the Indemnity Insurance Company of North America had said?

(Testimony of A. L. Crawford.)

Mr. BARATY.—We object to that as incompetent, irrelevant and immaterial. It is in no way binding upon the defendant corporation. [63]

The COURT.—Objection overruled; exception noted.

A. Mr. Baraty at that time said that he had taken it up with the insurance company and that they were not interested. I believe those were the words that he used.

Q. Now, then, thereafter and before the default was entered in this case, did you have a conversation with Mr. Cresswell, of the insurance company?

A. I was in the office of the Indemnity Insurance Company of North America, and—

Q. Located where?

I think it is located at 206 Sansome Street, this city and county, and I believe it is on the second floor. At that time I spoke to Mr. Cresswell.

Q. Who was present?

A. I believe Mr. Cresswell and myself were in Mr. Cresswell's little office.

Q. And that was before default was entered?

A. That was prior to the entry of the default.

Q. What was said? What was the conversation between you and Mr. Cresswell?

A. At that time I told Mr. Cresswell that we were going to take the default of Mr. Hooper, but that we would give them some time yet. Mr. Cresswell said to me at that time that they were not interested; that they had a good defense to this suit; to go ahead. After some more conversation he stated

(Testimony of A. L. Crawford.)

that he had several statements. What they were, I do not know.

Q. Now, then, did you enter the default after that, some time after?

A. I believe that I entered the default about three weeks subsequent to that time.

Q. Now, then, did you have a conversation with Mr. Cresswell after the default had been entered?

[64] A. I did.

Q. In the same office?

A. The same office, on the same floor.

Q. What persons were present?

A. Myself and Mr. Cresswell.

Q. What did you tell him?

A. I told Mr. Cresswell at that time that we had taken the default and that judgment had been entered. I further told him that if he wanted to, we would set aside the default judgment, and that a trial could be had upon the merits.

Q. Was that the—all the conversations you had with him?

A. I have had several conversations since that time.

Q. With whom? A. With Mr. Cresswell.

Q. At the same place? A. At the same place.

Q. What was the next conversation?

A. Along the same tenor. There was one other thing in which I was involved which has nothing to do with this action. [65]

to that effect. It was about two or three weeks later that I had the first conversation with Mr.

(Testimony of A. L. Crawford.)

Cresswell, and then I had a few conferences with Mr. Cresswell later on.

This witness, being recalled by plaintiffs for further direct examination, in rebuttal, testified as follows:

On October 20, 1929, I had a conversation with Mr. Joe Bargass, at Saratoga. At that time I asked him what he recollected of the conversation he had had that morning with Roy Hooper.

Q. In response to that, what did he reply?

A. Mr. Bargass told me on that he made this statement to Mr. Hooper. He said, "You know you took the car without Mrs. Kittredge's permission, and you know that it is not good policy." And I asked Mr. Bargass at that time if he actually knew whether or not Mr. Hooper had done so, and if he had been in or about the ranch at the time that Mr. Hooper left the evening before, and he said, "No," that he was in San Jose, and that he did not arrive back at the ranch until some time after Mr. Hooper had left. And I asked him if he had seen Mrs. Kittredge when he returned from the ranch—to the ranch—and he said, "No," he had not. In view of that I said furthermore, I said, "Now, Mr. Bargass," I said, "do you or do you not know what Mr. Hooper meant when he said he did not want Mrs. Kittredge to know about this?" Those were the words I used, and he said, "I do not know." I said, "Do you know whether or not it was referring to the accident or whether it was referring to what you said when you said that Mr. Hooper had taken

(Testimony of A. L. Crawford.)

the car without Mrs. Kittredge's permission?" I discussed that matter with Mr. Bargass for over thirty-five minutes.

Cross-examination.

Q. Mr. Crawford, who said that they did not want Mrs. Kittredge to know that Hooper had killed a man? Who said that? [66]

A. Mr. Hooper said he did not want Mrs. Kittredge to know about this. Speaking of the fact that Mr. Hooper had struck Mr. Forrest and killed him.

Q. Now, that is your testimony that Hooper, the man who had caused the accident, told Mr. Bargas, the foreman, that he did not want his employer to know that he had killed a man a few hours after running into him with an automobile?

A. That is my testimony.

Q. Yes. Now, did Mr. Bargass tell you that he stated to Hooper, "That is what you get for taking an automobile without permission of the owner"?

A. That is what Mr. Bargas told me that morning also.

Q. He told you that also? A. Yes, sir.

Q. And to that what answer did Hooper make?

A. Hooper did not make any answer.

Q. So that you are definite on the proposition that Bargass said to Hooper that you are bound to have an accident, or accident occur, or words to

(Testimony of A. L. Crawford.)

that effect, when you take these things without the permission of the owner?

A. I am quite definite *of* that, because he made that statement.

Q. And that is the statement that you heard him make this morning here?

A. That is the same statement, practically in the same words.

Q. Now, then, the only thing that he added to the conversation is that Hooper said to Bargass, "I don't want Mrs. Kittredge to know that I killed a man. I don't want Mrs. Kittredge to know about this."

Q. Well, "About this." What did "about this" refer to?

A. As far as I understood from the tenor of the conversation with Mr. Bargass, it was about the death of Mr. Forrest and about the smash-up with the machine.

Q. Didn't you discuss with Bargass that Mrs. Kittredge was bound [67] to know about his death within a few minutes, because she only lived a quarter of a mile away?

A. That is quite true, but I also discussed with Mr. Bargass at the same time the fact that Mrs. Kittredge had been quite ill and the desire of Mr. Hooper to ease the shock, if possible. I discussed the matter of Mr. Bargass telling me at the time that he was the same as a member of the family. He had been in the employ of Mrs. Kittredge for thirty years, Mr. Baraty.

Mr. BARATY.—I think that is all.

Mr. BROWN.—That is all.

The COURT.—Is the testimony all in on both sides?

Mr. BROWN.—Yes.

Mr. BARATY.—Yes.

Mr. BARATY.—I desire to move the Court that this jury be dismissed, and that this action declared a mistrial for failure of the plaintiff to inform the Court or the jury of the marriage of the plaintiff, or the existence of her husband, whose occupation and whereabouts was not disclosed to the jury, and for all that we may know, there may be some of the jurors that do know her present husband; I make the motion on the grounds of prejudice to this defendant's case by reason of the failure to disclose the existence of the present husband.

The COURT.—The motion is denied, and exception noted.

Mr. BARATY.—We next move, your Honor, to reverse your ruling on the question of the admission of hearsay testimony in the deposition, and that your Honor sustain the objections made in open court to the hearsay testimony on the grounds that under Section 2032 of the Code of Civil Procedure of the State of California, depositions are taken subject to exceptions except as to the form of the questions; we contend that every question asked in a deposition, the objections as to the legality of the questions is reserved for the trial, and can be made at the trial, excepting [68] it be

for questions which are irregular in form, and then those objections have to be made and taken at the time the deposition is taken.

The COURT.—The motion is denied; exception noted.

Mr. BARATY.—At this time, I move the Court for a directed verdict in favor of the defendant, Indemnity Insurance Company of North America, and if the motion be not granted, that the case go to the jury the motion is made upon the insufficiency of the evidence, to sustain the allegations of the complaint.

The COURT.—Motion denied; exception noted. Now, you asked, Mr. Baraty, for permission to amend the answer to set up, what was it?

Mr. BARATY.—I wanted to set up the failure of Hooper to serve upon the defendant corporation the copy of the complaint; that is, comply with Section D of the policy requiring him to serve all legal process of the insurance company; and likewise, I want to amend to set off his failure to cooperate in the defense of that action as required by Section D of the policy; that was the initial motion made by me at the commencement of the trial; that is to say, I want to more specifically set forth the defense of failure to deliver the summons and complaint to the defendant insurance company, and the failure upon the part of Hooper to cooperate in the defense of that action with the insurance company.

The COURT.—I will allow that amendment.

The foregoing constituted all of the evidence given in the trial of said action. The defendant, Indemnity Insurance Company of North America, thereupon requested the Court to instruct the jury as follows, but the Court refused to give each of the following instructions, to which this defendant duly excepted. The instructions which were refused are as follows: [69]

DEFENDANT'S INSTRUCTIONS WHICH WERE REFUSED.

I.

You are instructed to find and return a verdict in favor of the defendant, Indemnity Insurance Company of North America.

III.

The evidence produced on the part of plaintiffs must be of greater weight, quality and convincing effect than that produced by the defendant. If, therefore, you find that the evidence produced by the plaintiffs and the evidence produced by the defendant Indemnity Insurance Company of North America is equally balanced, both in weight, quality and convincing effect, I instruct you that the plaintiffs have failed to prove the allegations of their complaint by the preponderance of the evidence. In that event, if you so find, your verdict must be against the plaintiffs and in favor of the defendant, Indemnity Insurance Company of North America.

VI.

You are instructed that if you should find that at the time of the said accident the said Roy Hooper was operating the said Buick automobile without the permission of said Mary C. Kittredge and was not operating the said automobile on the business or for or on behalf of said Mary C. Kittredge, then your verdict must be against the plaintiffs and in favor of defendant, Indemnity Insurance Company of North America.

VII.

You are instructed that if you should find that said Roy Hooper failed within a reasonable time after the receipt of same to deliver to defendant any pleading or paper or any kind relating to any claim, suit or proceeding arising out of said accident, that your verdict shall be against plaintiffs and in favor of defendant, Indemnity Insurance Company of North America. [70]

VIII.

You are instructed that if you should find that in the action brought by plaintiffs herein against said Roy Hooper, and in which judgment was recovered in favor of plaintiffs and against said Roy Hooper, that said Roy Hooper failed to render to the Indemnity Insurance Company of North America, all co-operation and assistance in his power in the defense of said action, then your verdict shall be against the plaintiffs herein and in favor of defendant, Indemnity Insurance Company of North America.

The Court instructed the jury as follows, and the instructions herein set forth were the only instructions that were given:

COURT'S CHARGE TO THE JURY.

The COURT.—(Orally.) Gentlemen of the Jury:

I.

In an action of this nature the burden of proof is on the plaintiffs to establish all the material allegations in the complaint by a preponderance of the evidence, and if, upon a consideration of the whole case, you find that plaintiffs have failed to do this, or that the evidence balances equally, your verdict must be for the defendant, the Indemnity Insurance Company of North America.

II.

I instruct you that a witness wilfully false in a material part of his testimony is to be distrusted in other parts.

III.

I instruct you that in the consideration of this case, you are not to be influenced or controlled by any sympathy you may have for the plaintiff, but you are to consider only the evidence in the case and the law as the same is given to you by the Court.

It is a solemn duty that you have taken, under oath, to [71] discharge, that you will strive to reach a verdict in this case, regardless of any question of sympathy, prejudice, bias or other circum-

stances, unrelated to the questions of fact, which is to be decided by you.

IV.

Plaintiffs recovered a judgment against Roy Hooper in the sum of $5,334 in the Superior Court of San Mateo County. The execution thereon having been returned unsatisfied, plaintiffs now seek to recover on that judgment from the defendant. insurance company, insurers of the owner of the Buick automobile, which Hooper was driving at the time the plaintiff's husband was killed.

V.

Under the provisions of the policy, plaintiffs' claim to recovery is, first, that Hooper was driving the Buick car with the permission of the insured owner, and second, that the conditions of the policy with respect to suits were complied with.

VI.

The question as to whether or not Hooper had permission, expressed or implied, is a question of fact for you to determine, taking into consideration the fact of Hooper's employment by the owner of the car as chauffeur, and the evidence as to the circumstances under which he was driving the car on the Saturday when the injury giving rise to the accident occurred.

VII.

The testimony of one witness entitled to credence is sufficient in a civil case to prove a point in issue. Therefore, if you believe the testimony of the wit-

ness, Roy Hooper, it is sufficient to establish that the automobile was used with the permission, either expressed or implied, by its owner.

VIII.

You are instructed that if you should find that at the time of the said accident Roy Hooper was operating the Buick automobile [72] without the permission of Mary C. Kittredge, then your verdict must be against the plaintiffs and in favor of the defendant, the Indemnity Insurance Company of North America.

IX.

The insurance policy sued upon requires the insured to give the insurance company prompt notice of claims of suits arising out of an accident. The notice referred to may be given to the insurance company by any person connected with the suit or claim, and the giving of such notice is sufficient to bind the insurance company. If you find that the insurance company did receive reasonably prompt notice of the Superior Court action, of which we are concerned, and or the later service on Hooper from the plaintiffs herein, or their attorneys, then the requirements of the policy as to notice were satisfied. If you find that this requirement was not satisfied, the plaintiffs cannot recover.

Of the foregoing instructions so given by the Court, instruction number VII was proposed by plaintiffs; instructions numbers I, II and III were proposed by defendants, and instructions numbered

IV, V, VI, VIII and IX were given by the Court of its own motion.

Mr. BARATY.—The defendant excepts to the giving of instruction Number VII proposed by plaintiffs, on the grounds that that instruction is not warranted by the pleadings, inasmuch as there is no pleading alleging that permission was given to use the automobile.

The COURT.—And you do not object to the instruction given by the Court on the subject of notice.

Mr. BARATY.—No, I object to the instructions given by the Court generally.

The COURT.—In the Federal Court you have to specify the [73] particular instruction.

Mr. BARATY.—My objection is to any instruction given with reference to permission, that it is not within the issues pleaded.

The COURT.—As to that instruction, your exception is sufficient.

The jury may now retire and deliberate on your verdict.

After being instructed as aforesaid, the jury retired for deliberation, and thereafter, and on the 13th day of February, 1930, a verdict for the plaintiff in the sum of Fifty-three Hundred and Thirty-four Dollars ($5334.00), together with interest on the said sum from the 3d day of May, 1928, was given.

Within ten (10) days after the rendition of said verdict, and the entry of judgment therein, the defendant, Indemnity Insurance Company of North

America, duly served and filed its notice of intention to move for a new trial, which notice of intention and motion are in the words and figures as follows:

"In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 18,331—K.

BELVA FORREST and ROLAND CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,

Plaintiffs,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, JOHN DOE COMPANY and RICHARD ROE CO., a Corporation,

Defendants.

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof, and to the Above-named Plaintiffs and to Messrs. Joseph A. Brown and A. L. Crawford, Their Attorneys:

NOTICE IS HEREBY GIVEN to you and to each of you that the defendant, Indemnity Insurance Company of North America, a [74] corporation, intends to move the above-entitled court

for an order vacating and setting aside the verdict of the jury herein on the 13th day of February, 1930, and the judgment entered thereon, and to grant a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.
2. That said verdict is against law.
3. Errors in law occurring at the trial and excepted to by said defendant.
4. Irregularity in the proceedings of the plaintiffs by which said defendant was prevented from having a fair trial.
5. Irregularity in the proceedings of the court by which said defendant was prevented from having a fair trial.
6. Orders of the Court by which said defendant was prevented from having a fair trial.
7. Abuse of discretion by the Court by which said defendant was prevented from having a fair trial.
8. Accident or surprise which ordinary prudence could not have guarded against.

Said motion will be made and based upon this notice, upon each and every of the grounds hereinabove set forth; upon all of the pleadings, papers, files, records and orders of the Court on file herein; upon the documentary evidence offered at the trial herein; upon the report of the proceedings on the trial herein taken by the phonographic reporter or to a certified transcript of said report; upon the minutes of the court; upon such proceedings

occurring at the trial herein as are within the recollection of the judge herein; upon affidavits to be prepared, filed and served upon you.

Dated: February 21, 1930.

HARTLEY F. PEART and
GUS L. BARATY,

Attorneys for Defendant, Indemnity Insurance Company of North America. [75]

MOTION OF DEFENDANT, INDEMNITY INSURANCE COMPAY OF NORTH AMERICA, FOR A NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof, and to the Above-named Plaintiffs and to Messrs. Joseph A. Brown and A. L. Crawford, Their Attorneys:

Comes now the defendant, Indemnity Insurance Company of North America, a corporation, and moves the above-entitled court for an order vacating and setting aside the verdict of the jury on the 13th day of February, 1930, and the judgment entered thereon, and granting a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against law.

3. Errors in law occurring at the trial and excepted to by said defendant.

4. Irregularity in the proceedings of the plaintiffs by which said defendant was prevented from having a fair trial.

5. Irregularity in the proceedings of the court by which said defendant was prevented from having a fair trial.

6. Orders of the Court by which said defendant was prevented from having a fair trial.

7. Abuse of discretion by the Court by which said defendant was prevented from having a fair trial.

8. Accident or surprise which ordinary prudence could not have guarded against.

Said motion will be made and based upon this notice, upon each and every of the grounds hereinabove set forth; upon all of the pleadings, papers, files, records and orders of the Court on file herein; upon the documentary evidence offered at the trial herein; upon the report of the proceedings of the trial herein taken by the phonographic reporter or to a certified transcript of said report; upon the minutes of the court; upon such proceedings [76] occurring at the trial herein as are within the recollection of the judge herein; upon affidavits to be prepared, filed and served upon you.

Dated: February 21, 1930.

HARTLEY F. PEART and
GUS L. BARATY,

Attorneys for Defendant, Indemnity Insurance Company of North America."

That thereafter and on the 24th day of March, 1930, said motion for a new trial came on regularly for hearing and was argued, whereupon the Court, on March 29, 1930, made the following order, entered in the minutes of the court:

"Saturday, March 29, 1930.

Court met pursuant to adjournment.

Present: Hon. FRANK H. KERRIGAN, Judge.
Clerk (MORRIS).
Crier: ED DRYDEN.
Bailiff: SHELLEY INCH.

The COURT.—It is ordered that the motion for a new trial herein and heretofore submitted be, and the same is hereby denied."

Thereafter, and on the 2d day of April, 1930, the defendant, Indemnity Insurance Company of North America, a corporation, appeared in open court by its counsel, and noted its exception to the ruling of the Court denying its motion for a new trial herein, and said exception was allowed by the above-entitled court. [77]

DEFENDANT'S SPECIFICATION OF PARTICULARS WHEREIN THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT.

1. The evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that the automobile in question at the time of the accident mentioned in the complaint was being operated for the use or benefit or in the course of the business of the named assured, Mary C. Kittredge, but, on the contrary, the evidence shows affirmatively that at the time of the said accident the said automobile was

being used and operated by Roy Hooper, on his own independent pleasure.

2. The evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that at the time of the accident in question the said automobile was maintained, managed and operated by Roy Hooper, as chauffeur while in the course of his employment as chauffeur for said Mary C. Kittredge, but, on the contrary, the evidence shows affirmatively that at the time of the said accident the said automobile was being operated by said Roy Hooper on his own independent pleasure, and not in the course of his employment for the named assured, Mary C. Kittredge.

3. That the evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that at the time of the said accident the said Roy Hooper was operating the said Buick automobile with the permission of said Mary C. Kittredge, or with the permission of an adult member of the household of said named assured, other than a chauffeur or domestic servant, but, on the contrary, the evidence shows affirmatively that at the time of the said accident said automobile [78] was not being operated with the permission of the named assured, or any adult member of her household.

4. That the evidence was and is insufficient to justify the verdict or judgment in this: that there

was and is no evidence showing or tending to show and the evidence failed and fails to show that Roy Hooper forthwith after the receipt thereof forwarded to the defendant any process or pleading or paper relating to any claim or suit or proceeding concerning the accident alleged in the complaint, but, on the contrary, the said Roy Hooper wholly failed and neglected to forward to this defendant any process or pleading or paper of any kind relating to said or any suit or claim or proceeding, and wholly failed and neglected to forward to this defendant a copy of the summons and complaint, or to give to this defendant any notice of any service upon him of any summons and complaint in that certain action set forth and referred to in the complaint herein wherein the said Roy Hooper was defendant.

5. That the evidence was and is insufficient to justify the verdict or the judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that the said Roy Hooper at all times rendered to this defendant all co-operation and assistance in his power in the defense of said suit and action pending in the Superior Court of San Mateo County and set forth in the complaint on file herein, but, on the contrary, the evidence shows affirmatively that said Roy Hooper did not at any time or times or at all render to this defendant any co-operation or assistance whatsoever, as required by the terms of this defendant's policy.

6. That the verdict was and is against law in each and every of the particulars specified from 1 to 5 wherein it is alleged that the evidence was and is insufficient to justify the said verdict. [79]

DEFENDANT'S SPECIFICATIONS OF ERROR.

Defendant, Indemnity Insurance Company of North America, specifies the following errors at law occurring at the trial and excepted to by said defendant, and assigned and specified as error the following:

1. Insufficiency of the evidence to justify the verdict, as hereinabove set forth.

2. The Court erred in denying the motion of this defendant to strike out the following answer given by witness Roy Hooper on direct examination to the following question:

> "Q. What did she say to you?
>
> A. I asked her permission to go to the city Saturday afternoon at 4:30, and in so doing, I delivered a package handed to me by the nurse —whether it was Mrs. Kittredge's package being sent there or not,—the nurse handed it to me, and I delivered it to the Fairmont Hotel, and I can't say whether it was from Mrs. Kittredge or the nurse."

3. The Court erred in overruling this defendant's objection to the following question asked of witness Hooper on redirect examination:

"Q. Had you ever driven either the Buick or Ford car of Mrs. Kittredge to San Francisco prior to the 8th day of August, 1926?"

4. The refusal of the Court to grant this defendant's motion for nonsuit.

5. The refusal of the Court to admit in evidence Defendant's Exhibit "C" for identification.

6. The Court erred in overruling this defendant's objection to the following question asked of witness Forsyth on cross-examination:

"Q. Mr. Forsyth, weren't you informed of the pendency of this suit and the service of this summons on Hooper by [80] Mr. Baraty, and the fact that he had been notified by Mr. Crawford and myself that this suit had been started and served on Hooper, and asking Mr. Baraty whether he wanted to appear on behalf of the company, and didn't Mr. Baraty communicate that to you?"

7. The Court erred in sustaining plaintiffs' objection to the following question asked of witness Brown on direct examination:

"Q. What did she say to you, if anything, concerning the accident that occurred on the 8th day of August, 1926?"

8. The Court erred in sustaining the objection of plaintiffs to the foregoing question asked of witness Brown on direct examination, after the death of Mary C. Kittredge had been established.

9. The Court erred in sustaining the plaintiffs'

objection to the following question asked of witness Brown, on direct examination:

> "Q. What did Mrs. Kittredge say to you—what did she say to you in the conversation held by yourself with her at her premises on the day of the accident, concerning the matter of her automobile, or whether she gave Roy Hooper permission to use the car, for her or for himself?"

10. The refusal of the Court to permit defendant to interrogate the jury as to whether any of them were acquainted with the plaintiff's present husband, when it appeared during the course of *of* the trial that the plaintiff had remarried, and that her new name was Belva Dovan.

11. The Court erred in overruling the objection of this defendant to the following question asked of witness Crawford, on direct examination:

> "Q. Did you have any conversation within three or four days after the service of summons on Roy Hooper, with Mr. [81] Gus L. Baraty, one of the attorneys in this case?"

12. The Court erred in overruling the objection of this defendant to the following question asked of witness Crawford on direct examination:

> "Q. What was that conversation?"

13. The Court erred in overruling the objection of this defendant to the following question asked of witness Crawford, on direct examination:

"Q. Was anything said about what the Indemnity Insurance Company of North America had said?"

14. Refusal of the Court to dismiss the jury and to declare a mistrial.

15. Refusal of the Court to grant this defendant's motion to exclude from evidence all hearsay testimony given on behalf of plaintiff.

16. The refusal of the Court to grant this defendant's motion for a directed verdict in favor of this defendant.

17. The refusal of the Court to give instructions requested by the defendant, as hereinbefore set forth.

18. The giving of instruction No. 7, proposed by plaintiffs, to which exception was taken by defendant, as hereinabove set forth.

19. The refusal of the Court to grant this defendant's motion for a new trial.

The foregoing constitutes all of the proceeding had, and all of the testimony taken, and evidence offered and received on the trial of said action, and all matters proved on said trial. Now, within the time required by law, and the rules of this Court, the said defendant, Indemnity Insurance Company of North America, a corporation, hereby proposes the foregoing as and for its bill of exceptions in this case, and prays that the same may be [82]

settled, allowed, signed, and certified as provided by law.

HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Defendant, Indemnity Insurance Company of North America, a Corporation.
[83]

STIPULATION TO FOREGOING AS THE BILL OF EXCEPTIONS IN THE ABOVE-ENTITLED ACTION AND TO THE CORRECTNESS OF SAME.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is correctly engrossed, is true and correct, and that the same may be settled and allowed as the bill of exceptions of defendant, Indemnity Insurance Company of North America, on its appeal from the judgment in the above-entitled action.

Dated: May 10th, 1930.

JOS. A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.
HARTLEY F. PEART and
GUS L. BARATY,
Attorneys for Defendant Indemnity Insurance Company of North America.

ORDER SETTLING, CERTIFYING AND ALLOWING BILL OF EXCEPTIONS.

The attached and foregoing bill of exceptions, now being presented in due time, and found to be

correct, I do hereby certify that the said bill is a full, true and correct bill of exceptions in the above-entitled action, and that the recitals therein regarding the evidence are true and correct, and that the same is accordingly hereby approved, settled, certified and allowed.

Dated: May 12th, 1930.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed May 12, 1930. [84]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled matter, find a verdict in favor of plaintiffs, Belva Forrest and Ronald Claude Forrest, a minor, and against the defendant, Indemnity Insurance Company of North America, a corporation, for the sum of Five Thousand Three Hundred Thirty-four Dollars ($5,334.00), together with interest on said sum from the 3d day of May, 1928.

Dated: February 13, 1930.

JOHN T. ROBERTS,
Foreman.

[Endorsed]: Filed Feb. 13, 1930, at 12:25 P. M. [85]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,331—K.

BELVA FORREST and ROLAND CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,

Plaintiffs,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, JOHN DOE COMPANY, and RICHARD ROE CO., a Corporation,

Defendants.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial on the 12th day of February, 1930, being a day in the November, 1929, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Joseph A. Brown, Esquire, appearing as attorney for plaintiffs, and Hartley F. Peart, Esquire, appearing as attorney for defendants, and the trial having been proceeded with on the 13th day of February, in said year and term, and oral and documentary evidence on behalf of the respective parties, having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subse-

quently rendered the following verdict, which was ordered recorded, namely: "We, the jury in the above-entitled matter, find a verdict in favor of plaintiffs, Belva Forrest and Ronald Claude Forrest, a minor, and against the defendant, Indemnity Insurance Company of North America, a corporation, for the sum of Five Thousand Three Hundred Thirty-four Dollars ($5,334.00), together with interest on said sum from the 3d day of May, 1928. Dated: February 13, 1930. John T. Roberts, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Belva Forrest and Ronald Claude Forrest, a minor, by Belva Forrest, his guardian *ad litem,* plaintiffs, do have and recover of and from Indemnity Insurance Company of North America, a corporation, defendant, the sum of Five Thousand Nine Hundred Ninety-seven and 78/100 (5,997.78) Dollars, together with their costs herein expended taxed at $171.58.

Judgment entered this 13th day of February, 1930.

WALTER B. MALING,
Clerk. [86]

[Title of Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof, and to the Above-named Plaintiffs and to Messrs. Joseph A. Brown and A. L. Crawford, Their Attorneys:

NOTICE IS HEREBY GIVEN to you and to each of you that the defendant, Indemnity Insurance Company of North America, a corporation, intends to move the above-entitled court for an order vacating and setting aside the verdict of the jury herein on the 13th day of February, 1930, and the judgment entered thereon, and to grant a new trial at the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against law.

3. Errors in law occurring at the trial and excepted to by said defendant.

4. Irregularity in the proceedings of the plaintiffs by which said defendant was prevented from having a fair trial.

5. Irregularity in the proceedings of the Court by which [87] said defendant was prevented from having a fair trial.

6. Orders of the Court by which said defendant was prevented from having a fair trial.

7. Abuse of discretion by the Court by which said defendant was prevented from having a fair trial.

8. Accident or surprise which ordinary prudence could not have guarded against.

Said motion will be made and based upon this notice, upon each and every of the grounds hereinabove set forth; upon all of the pleadings, papers, files, records and orders of the Court on file herein; upon the documentary evidence offered at the trial herein; upon the report of the proceedings on the trial herein taken by the phonographic reporter or to a certified transcript of said report; upon the minutes of the court; upon such proceedings occurring at the trial herein as are within the recollection of the judge herein; upon affidavits to be prepared, filed and served upon you.

Dated: February 21, 1930.

HARTLEY F. PEART and
GUS L. BARATY,

Attorneys for Defendant, Indemnity Insurance Company of North America.

MOTION OF DEFENDANT, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, FOR A NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof, and to the Above-named Plaintiffs and to Messrs. Joseph A. Brown and A. L. Crawford, Their Attorneys:

Comes now the defendant, Indemnity Insurance Company of North America, a corporation, and moves the above-entitled court for an order vacating

and setting aside the verdict of the jury [88] herein on the 13th day of February, 1930, and the judgment entered thereon, and granting a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.
2. That said verdict is against law.
3. Errors in law occurring at the trial and excepted to by said defendant.
4. Irregularity in the proceedings of the plaintiffs by which said defendant was prevented from having a fair trial.
5. Irregularity in the proceedings of the Court by which said defendant was prevented from having a fair trial.
6. Orders of the Court by which said defendant was prevented from having a fair trial.
7. Abuse of discretion by the Court by which said defendant was prevented from having a fair trial.
8. Accident or surprise which ordinary prudence could not have guarded against.

Said motion will be made and based upon this notice, upon each and every of the grounds hereinabove set forth; upon all of the pleadings, papers, files, records and orders of the Court on file herein; upon the documentary evidence offered at the trial herein; upon the report of the proceedings on the trial herein taken by the phonographic reporter or to a certified transcript of said report; upon the minutes of the court; upon such proceedings occurring at the trial herein as are within the recol-

lection of the judge herein; upon affidavits to be prepared, filed and served upon you.

Dated: February 21, 1930.

HARTLEY F. PEART and
GUS L. BARATY,

Attorneys for Defendant, Indemnity Insurance Company of North America.

Receipt of a copy of the within notice of intention to move for new trial and motion of defendant Indemnity Insurance Company of North America, for a new trial, is hereby admitted this 21 day of February, 1930.

JOS. A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 21, 1930. [89]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 29th day of March, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 29, 1930—ORDER DENYING MOTION FOR NEW TRIAL.

Ordered that the motion for a new trial heretofore submitted be and the same is hereby denied. [90]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable FRANK H. KERRIGAN, Judge of the United States District Court:

The above-named defendant, Indemnity Insurance Company of North America, a corporation, feeling aggrieved by the verdict rendered in this court on the 13th day of February, 1930, and the judgment entered therein on the 13th day of February, 1930, in favor of the plaintiffs above named, which judgment was in the sum of $5,334.00, together with interest on said sum from the 3d day of May, 1928, together with costs, does hereby appeal from the said judgment and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons set forth in the assignment of errors filed herewith, and said Indemnity Insurance Company of North America, a corporation, prays that its plea be allowed and that citation be

issued as provided by law, and that a transcript of the record, proceedings and documents upon which judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals [91] for the Ninth Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that all further proceedings be suspended, stayed and superseded until the termination of said appeal by said United States Circuit Court of Appeals, and that the proper order relating to and fixing the amount of security to be required of it be made.

And your petitioner will ever pray, etc.

Dated: San Francisco, California, April 7, 1930.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Defendant.

HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Said Defendant.

Receipt of copy of the within petition for appeal is hereby admitted this 11 day of April, 1930.

JOS. A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 11, 1930. [92]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant, Indemnity Insurance Company of North America, a corporation, and contends that in the record, verdict, decision, final judgment and orders in said cause, there has been manifest and material error and in connection herewith, and as part of its appeal herein, makes and files the following assignment of error on which it will rely in the prosecution of its appeal in said cause:

I.

The Court erred in refusing each of the following instructions, which were requested by this defendant:

1. The evidence produced on the part of plaintiffs must be of greater weight, quality and convincing effect than that produced by the defendant. If, therefore, you find that the evidence produced by the plaintiffs and the evidence produced by the defendant Indemnity Insurance Company of North America is equally balanced, both in weight, quality and convincing effect, I instruct you that the plaintiffs have failed to prove the allegations of their complaint by the preponderance of the evidence. In that event, if you so find, your verdict must be against the plaintiffs and in favor of the defendant, Indemnity Insurance Company of North America. [93]

2. You are instructed that if you should find that at the time of the said accident the said Roy Hooper was operating the said Buick automobile without the permission of said Mary C. Kittredge and was not operating the said automobile on the business or for or on behalf of said Mary C. Kittredge, then your verdict must be against the plaintiffs and in favor of defendant, Indemnity Insurance Company of North America.

3. You are instructed that if you should find that said Roy Hooper failed within a reasonable time after the receipt of same to deliver to defendant any pleading or paper of any kind relating to any claim, suit or proceeding arising out of said accident, that your verdict shall be against plaintiffs, and in favor of defendant, Indemnity Insurance Company of North America.

4. You are instructed that if you should find that in the action brought by plaintiff herein against said Roy Hooper, and in which judgment was recovered in favor of plaintiffs and against said Roy Hooper, that said Roy Hooper failed to render to the Indemnity Insurance Company of North America, all co-operation and assistance in his power in the defense of said action, then your verdict shall be against the plaintiffs herein and in favor of defendant, Indemnity Insurance Company of North America.

II.

The evidence was insufficient to justify the verdict in the following particulars:

1. The evidence was and is insufficient to justify

the verdict or judgment in this: that there was and is no evidence showing or tending to show, and the evidence failed and fails to show that the automobile in question at the time of the accident mentioned in the complaint was being operated for the use or benefit or in the course of the business of the named assured, Mary C. Kittredge, but, on the contrary, the evidence shows affirmatively that at the time of the said accident the said [94] automobile was being used and operated by Roy Hooper, on his own independent pleasure.

2. The evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show, and the evidence failed and fails to show, that at the time of the accident in question the said automobile was maintained, managed and operated by Roy Hooper, as chauffeur while in the course of his employment as chauffeur for said Mary C. Kittredge, but, on the contrary, the evidence shows affirmatively that at the time of the said accident the said automobile was being operated by said Roy Hooper on his own independent pleasure, and not in the course of his employment for the named assured, Mary C. Kittredge.

3. That the evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show, and the evidence failed and fails to show, that at the time of the said accident the said Roy Hooper was operating the said Buick automobile with the permission of said Mary C. Kittredge, or with the per-

mission of an adult member of the household of said named assured, other than a chauffeur or domestic servant, but, on the contrary, the evidence shows affirmatively that at the time of the said accident said automobile was not being operated with the permission of the named assured, or any adult member of her household.

4. That the evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that Roy Hooper forthwith after the receipt thereof forwarded to the defendant any process or pleading or paper relating to any claim or suit or proceeding concerning the accident alleged in the complaint, but, on the contrary, the said Roy Hooper wholly failed and neglected to forward to this defendant any process [95] or pleading or paper of any kind relating to said or any suit or claim or proceeding, and wholly failed and neglected to forward to this defendant a copy of the summons and complaint, or to give to this defendant any notice of any service upon him of any summons and complaint in that certain action set forth and referred to in the complaint herein wherein the said Roy Hooper was defendant.

5. That the evidence was and is insufficient to justify the verdict or the judgment in this: that there was and is no evidence showing or tending to show, and the evidence failed and fails to show, that the said Roy Hooper at all times rendered to this defendant all co-operation and assistance in his

power in the defense of said suit and action pending in the Superior Court of San Mateo County, and set forth in the complaint on file herein, but, on the contrary, the evidence shows affirmatively that said Roy Hooper did not at any time or times or at all render to this defendant any co-operation or assistance whatsoever, as required by the terms of this defendant's policy.

III.

The Court erred in denying the motion of this defendant to strike out the following answer by witness Roy Hooper on direct examination to the following question:

"Q. What did she say to you?

A. I asked her permission to go to the City Saturday afternoon at 4:30, and in so doing, I delivered a package handed to me by the nurse—whether it was Mrs. Kittredge's package being sent there or not—the nurse handed it to me, and I delivered it to the Fairmont Hotel, and I can't say whether it was from Mrs. Kittredge or the nurse."

IV.

The Court erred in overruling this defendant's objection to the following question asked of the witness Hooper [96] on redirect examination:

"Had you ever driven either the Buick or Ford car of Mrs. Kittredge to San Francisco prior to the 8th day of August, 1926?"

V.

The Court erred in overruling this defendant's

objection to the following question asked of witness Forsyth:

> "Q. Mr. Forsyth, weren't you informed of the pendency of this suit, and the service of this summons on Hooper by Mr. Baraty, and the fact that he had been notified by Mr. Crawford and myself that this suit had been started and served on Hooper, and asking Mr. Baraty whether he wanted to appear on behalf of the company, and didn't Mr. Baraty communicate that to you?"

VI.

The Court erred in sustaining plaintiff's objection to the following question asked of witness Brown on direct examination:

> "What did she say to you, if anything, concerning the accident that occurred on the 8th day of August, 1926?"

VII.

The Court erred in sustaining the objection of plaintiffs to the last above mentioned question addressed to witness Brown on direct examination, after the death of Mary C. Kittredge had been established.

VIII.

The Court erred in sustaining the plaintiff's objection to the following question asked of witness Brown on direct examination:

> "Q. What did Mrs. Kittredge say to you,—what did she say to you in the conversation

held by yourself with her at her premises on the day of the accident, concerning the matter of her automobile, or whether she gave Roy Hooper permission to use the car, for her or for himself?" [97]

IX.

The Court erred in overruling the objection of this defendant to the following question addressed to witness Crawford on direct examination:

"Q. Did you have any conversation within three or four days after the service of summons on Roy Hooper, with Mr. Gus L. Baraty, one of the attorneys in this case?"

X.

The Court erred in overruling the objection of this defendant to the following question of witness Crawford on direct examination.

"Q. What was that conversation?"

XI.

The Court erred in overruling the objection of this defendant to the following question asked of witness Crawford, on direct examination.

"Q. Was anything said about what the Indemnity Insurance Company of North America had said?"

XII.

1. The Court erred in refusing to grant this defendant's motion for nonsuit.

2. The Court erred in refusing to admit in evidence Defendant's Exhibit "C" for Identification.

3. The Court erred in refusing to dismiss the jury and to declare a mistrial.

4. The Court erred in refusing to grant this defendant's motion to exclude from evidence all hearsay testimony given on behalf of plaintiff.

5. The Court erred in refusing to grant this defendant's motion for a directed verdict. [98]

6. The Court erred in refusing to grant this defendant's motion for a new trial.

XIII.

That the judgment is contrary to law.

WHEREFORE, said defendant, Indemnity Insurance Company of North America, prays that the said judgment of the District Court of the United States may be reversed and held for naught.

Dated: April 7, 1930.

HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Defendant, Indemnity Insurance Company of North America.

Receipt of a copy of the within assignment of errors is hereby admitted this 11th day of April, 1930.

JOS. A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 11, 1930. [99]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of Hartley F. Peart and Gus. L. Baraty, attorneys for the above-named petitioner, and defendant, Indemnity Insurance Company of North America, a corporation, and upon filing the petition of said defendant for appeal,—

IT IS ORDERED that an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein on the 13th day of February, 1930, in favor of plaintiffs and against said defendant, and that the amount of the bond as required by law on said appeal be and the same is hereby fixed at $7,500.00, and said bond shall act as a supersedeas and cost bond, and execution shall be stayed pending the outcome of said appeal.

Dated: April 11th, 1930.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed April 11, 1930. [100]

[Title of Court and Cause.]

BOND ON APPEAL.

The rate of premium charged on this bond is $10 per thousand; the total of premium charged is $75.

KNOW ALL MEN BY THESE PRESENTS: That we, Indemnity Insurance Company of North

America, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, organized and existing under and by virtue of the laws of the State of Maryland and duly authorized to transact business and issue surety bonds in the State of California, as surety, are held and firmly bound unto Belva Forrest and Roland Claude Forrest, a minor, by Belva Forrest, his guardian *ad litem,* plaintiffs in the above-entitled action, in the sum of Seventy-five Hundred (7500.00) Dollars, to be paid to the said Belva Forrest and Roland Claude Forrest, a minor, their executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seal and dated this 12th day of April, 1930.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said court between Belva Forrest and Roland Claude [101] Forrest, a minor, by Belva Forrest, his guardian *ad litem,* plaintiffs, and Indemnity Insurance Company of North America, a corporation, defendant, a judgment was rendered against said defendant on the 13th day of February, 1930, for the sum of Five Thousand Three Hundred Thirty-four (5,334.00) Dollars, together with interest on said sum from the 3d day of May, 1928, and together with costs; and

WHEREAS, said defendant, Indemnity Insurance Company of North America, a corporation, having obtained from said court an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit, and a citation directed to said Belva Forrest and Roland Claude Forrest, a minor, by Belva Forrest, his guardian *ad litem,* citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty (30) days from the date of said citation,—

NOW, THEREFORE, the condition of this obligation is such that, if the said defendant, Indemnity Insurance Company of North America, a corporation, shall prosecute its said appeal to effect and satisfy the judgment against it and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void; otherwise to remain in full force and effect.

And further the undersigned surety agrees that in case of a breach of any condition hereof, the above-entitled court may, upon notice to the undersigned Fidelity and Deposit Company of Maryland of not less than ten (10) days, proceed summarily in the above-entitled cause to ascertain the amount which said Fidelity and Deposit Company of Maryland is bound to pay on account of such breach and render judgment therefor against it and award

execution thereof, not exceeding, however, the sum specified in this [102] undertaking.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation,
Principal.
By A. W. FORSYTH.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Surety.
By JOHN W. LATHAM,
Attorney-in-fact.
Attest: C. A. BEVANS,
Agent.

The within and foregoing bond on appeal is hereby approved, both as to sufficiency and form.

Dated: April 12, 1930.

FRANK H. KERRIGAN,
United States District Judge. [103]

State of California,
City and County of San Francisco,—ss.

On the twelfth day of April, A. D. 1930, before me, John McCallan, a notary public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared, John W. Latham, attorney-in-fact, and C. A. Bevans, agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation, therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose

names are subscribed to the within instrument as attorney-in-fact and agent respectively of said corporation and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as attorney-in-fact and agent respectively.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 12, 1930. [104]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

The defendant, Indemnity Insurance Company of North America, a corporation, respectfully requests that you prepare record on appeal in the above-entitled cause, and include therein the following:

1. Complaint of plaintiffs.
2. Demurrer of this defendant.
3. Order overruling demurrer to complaint.
4. Answer of this defendant.
5. Amended answer of this defendant.
6. Order denying motion for nonsuit.

7. Order denying defendant's motion for directed verdict.
8. Verdict of jury rendered February 13, 1930.
9. Judgment on the verdict entered February 13, 1930.
10. Defendant's notice of intention to move for a new trial and its motion therefor.
11. Order denying motion for a new trial.
12. Bill of exceptions.
13. Petition for appeal. [105]
14. Citation on appeal.
15. Assignment of errors.
16. Order allowing appeal.
17. Bond on appeal.
18. This praecipe.

Dated: April 12, 1930.

HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Said Defendant.

Received copy May 8, 1930.

JOS. A. BROWN.

[Endorsed]: Filed May 12, 1930. [106]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California do hereby, certify the foregoing 106 pages, numbered from 1 to 106, inclusive, to be a full, true and correct copy of the record and pro-

ceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $36.40; that the said amount was paid by the appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 10th day of June, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [107]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to Belva Forrest and Ronald Claude Forrest, a Minor, by Belva Forrest, His Guardian *ad Litem,* and Joseph A. Brown, Esq., and A. L. Crawford, Esq., Their Attorneys, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof,

pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Belva Forrest and Ronald Claude Forrest, a minor, by Belva Forrest, his guardian *ad litem,* were plaintiffs, and Indemnity Insurance Company of North America, a corporation, was defendant, and wherein Indemnity Insurance Company of North America, a corporation is appellant and you are appellees, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, Southern Division, this 12 day of April, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted this 14th day of April, 1930.

J. A. BROWN,
A. L. CRAWFORD,
Attorneys for Appellees.

Filed Apr. 14, 1930. [108]

[Endorsed]: No. 6165. United States Circuit Court of Appeals for the Ninth Circuit. Indemnity Insurance Company of North America, a Corporation, Appellant, vs. Belva Forrest and Ronald Claude Forrest, a Minor, by Belva Forrest, His Guardian *ad Litem,* Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 11, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (a corporation),

Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST (a minor), by Belva Forrest, his guardian ad litem,

Appellees.

BRIEF ON BEHALF OF APPELLANT.

HARTLEY F. PEART,
GUS L. BARATY,
Hunter-Dulin Building, San Francisco,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

No. 6165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (a corporation),
Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST (a minor), by Belva Forrest, his guardian ad litem,
Appellees.

BRIEF ON BEHALF OF APPELLANT.

FACTS.

The Complaint.

This action was commenced by the widow and minor child of Claude E. Forrest, upon an automobile insurance policy issued by appellant. The complaint alleges, that:

Claude E. Forrest met his death August 8, 1926, when struck by an automobile driven by Roy Hooper, belonging to Mrs. Mary C. Kittredge. At the time of the accident the said policy of insurance was in full force. (Tr. p. 3.)

On March 22, 1928, appellees obtained a judgment against said Roy Hooper in the sum of $5324.00, which was not paid; that at the time of said accident said Roy Hooper was operating said automobile in the course of his employment for Mrs. Kittredge. (Tr. p. 5.)

The policy contained, under terms "Additional Insured" what is known as Section "A" (Tr. p. 3), which provides as follows:

> "It is understood and agreed, unless limited by endorsement attached hereto, that this policy is extended to cover as additional Assured, any person, or persons riding in or legally operating any automobile described in the Declarations, and any person * * * legally responsible for the operation thereof * * * provided such use or occupation is with the permission of the named Assured * * *."

The Amended Answer.

The appellant admits the existence of the policy but denies that Hooper at the time of the accident was operating the automobile in the course of his employment for Mrs. Kittredge, the named assured. (Tr. p. 18.)

Appellant denies that Hooper was an insured of appellant (Tr. p. 20); appellant then pleads the section of its policy requiring it to be notified and to receive all process or pleadings and that the assured would cooperate in the defense of any suit (Tr. p. 21); and that Hooper did not forward to appellant, after receipt, any pleading relating to this accident; that he suffered a default judgment to be entered against

him, without notifying the appellant and that he failed to cooperate with the appellant in the defense of said action. (Tr. pp. 22-23.)

After trial by jury, a verdict for plaintiff was rendered in the full amount prayed, namely $5334.00. (Tr. p. 27.)

The Evidence.

It appears from the evidence that on August 8, 1926, Hooper was employed by Mrs. Kittredge as a chauffeur at her ranch at Saratoga. It was Saturday afternoon, about four thirty P. M. of said day that he asked Mrs. Kittredge to be released for the rest of the day, said he was going to a San Francisco theatre, and asked her permission to take the automobile to San Francisco. He testifies that she granted him this permission. That the nurse gave him a package to deliver to the Fairmont Hotel, but does not know to whom it was to be delivered, or what was its contents, or its size, or whether it was a package for Mrs. Kittredge or for the nurse and that he delivered it to a bell hop at the hotel, and took no receipt therefor, and that Mrs. Kittredge gave him no directions as to the delivery of this package. (Tr. pp. 30, 33, 35, 37, 40.) After visiting the theatre, he started to return to Saratoga, and on Sunday morning, August 9, 1926, at about 2:30 o'clock, near Atherton, he had the accident which caused the death of Mr. Forrest. (Tr. p. 32.)

After the accident Hooper tended the injured man and at about 5:30 or 6:30 returned to the home of one Joe Bargas, at Saratoga, who was the gardner for

Mrs. Kittredge; reported the accident to the gardner, and told him that Mrs. Kittredge did not know that he had taken the automobile. (Tr. p. 78.) Hooper, however, denies having made this statement. (Tr. p. 40.) Hooper remained at the gardener's house for an hour or two, and then returned to the ranch, which was about three-quarters of a mile away. (Tr. p. 40.)

The following day, an investigator of the appellant insurance company called on Hooper, after his appearance before the Coroner's jury, at Palo Alto, and took from Hooper a signed statement wherein Hooper traced his actions the evening of the accident. This statement, signed by Hooper, was offered in evidence, and marked Defendant's Exhibit "A." (Tr. p. 43.) Among other things, in that statement, told the investigator, is found the following: that Hooper "went to San Francisco in pursuit of my own purposes, which consisted of business and pleasure." (Tr. p. 43.) On October 13, 1926, the appellees filed suit in the Superior Court of the State of California, in and for the County of San Mateo (Tr. p. 3), against Roy Hooper, Mrs. E. H. Kittredge—thereafter Walter Perry Johnson was substituted as executor of the estate of Mrs. Kittredge (Mrs. Kittredge having died October 20, 1926) (Tr. p. 74), and thereafter a dismissal against said Walter Perry Johnson, as such executor, was ordered on February 11, 1927. (Tr. p. 31.)

Roy Hooper was served with process in that action in the Superior Court, on March 28, 1927, and on March 2, 1928, appellees in that action requested the default of Roy Hooper (Tr. p. 31) and on May 5, 1928, a default judgment was entered in favor of Belva

Forrest and Donald Claude Forrest, a minor, in the Superior Court of San Mateo County, against Roy Hooper in the sum of $5333.00, which amount Hooper did not pay. (Tr. p. 29.)

Robert W. Forsyth, manager of the Coast Department of the appellant, testified that he had access to all of the files in the office concerning the matter in question; he produced a copy of the policy (the original having been destroyed by the executor of Mrs. Kittredge) and then testified that he was never notified by Roy Hooper, that process had been served upon Roy Hooper in the said action pending in the Superior Court of San Mateo County. (Tr. pp. 54-67.)

E. E. Cresswell, on behalf of the appellant testified that he was Pacific Coast Claims Manager of the appellant, and was familiar with the matters in question. Subsequent to the service of process upon Roy Hooper, Hooper did not confer with said Cresswell, and never delivered a copy of the said process in said Superior Court action. (Tr. p. 80.)

A. L. Crawford, one of the witnesses for appellee, and one of their attorneys of record testified (Tr. p. 82) that after service of process upon Hooper, he spoke with Mr. Gus L. Baraty, one of the attorneys of record for the appellant in this action, advising him of said service, but the said Mr. Baraty told him that he was not concerned with the matter. In passing we might say that this evidence was given over the objection of appellant.

This action was instituted and maintained by Belva Forrest and her minor child. At the outset of the case,

it was stipulated that they were the heirs of the decedent (Tr. p. 28); it was further stipulated that said Claude E. Forrest was the father of the child named, and the husband of the widow. (Tr. p. 32.)

Belva Forrest was called as a witness in rebuttal by appellant and testified as follows (Tr. p. 81): She first answered to the name of Belva Forrest, and when again asked what her name was at that time, she said Belva Dovan. She then stated that she had just prior to that time told the clerk of the Court that her name was Belva Forrest, and then again stated that her name was Belva Dovan, and spelled the name D-O-V-A-N; that she had been remarried, and was now living with her new husband, whose occupation was that connected with the Shell Oil Company at Martinez, and that she had been married since July 12, 1929. A motion was then made by appellant for permission to interrogate the jury, as to whether any of the gentlemen of the jury were acquainted with the lady's present husband or were in any way connected with the concern with whom he was employed. This motion was denied.

APPELLANT'S CONTENTIONS.

1. That Roy Hooper failed to forward to the appellant the process which was served upon him in the Superior Court of San Mateo County, in which action a default judgment was taken against him.

2. That Roy Hooper failed to render to appellant any cooperation or assistance in the defense of said Superior Court action.

3. That the evidence is insufficient to establish the fact that Roy Hooper was legally operating said automobile with the permission of the named assured, Mrs. Kittredge.

4. That the evidence is insufficient to establish the fact that said Roy Hooper was operating said automobile in the course of his employment as chauffeur by said Mrs. Kittredge, as alleged in the complaint.

5. That instructions requested by appellant should have been given and instructions given by the Court should not have been given.

6. That appellant should have been granted permission to interrogate the jury after the discovery of the fact that the widow had remarried, or that a mistrial should have been directed by the Court.

7. A directed verdict in favor of appellant should have been granted.

8. That appellant's motion for a new trial should have been granted.

9. Defendant's Exhibit "C," for identification, should have been admitted in evidence.

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1. **THAT ROY HOOPER FAILED TO FORWARD TO THE APPELLANT THE PROCESS WHICH WAS SERVED UPON HIM IN THE SUPERIOR COURT OF SAN MATEO COUNTY, IN WHICH ACTION A DEFAULT JUDGMENT WAS TAKEN AGAINST HIM.**

The policy issued by appellant protects, within its terms, the named assured, Mrs. Kittredge, or an additional assured, Roy Hooper (assuming he was operat-

ing the automobile on her behalf or with her permission). The policy, Defendant's Exhibit "B" (Tr. pp. 55-63), under the title "This Agreement is Subject to the Following Conditions" (Tr. p. 56), contains paragraph "D." (Tr. p. 59.) Paragraph "D" comes under the head of "Notice and Settlement," and provides as follows:

> "In the event of accident the assured shall give prompt written notice thereof to the company or to one of its duly authorized agents and (one) forward to the company forthwith after receipt thereof every process, pleading or other paper of any kind relating to any and all claims, suits or proceedings."

This paragraph applies to Roy Hooper who, if operating the automobile for the named assured, or with her permission, was an additional assured under the terms of the policy, paragraph "A" thereof. (Tr. p. 58.)

The evidence is without contradiction that Hooper never delivered to this appellant a copy of the summons and complaint in the Superior Court action, but permitted a default judgment to be entered against him. The record shows that on March 28, 1927, Hooper was served with this process and failed to send the same to appellant and that on March 2, 1928, nearly one year after, his default was entered. No attempt was made by Hooper or anyone else to deny or contradict the testimony of the officers of the appellant to the effect that this important provision of the policy was not complied with. This point has been

directly passed upon by this Court in the recent case of

Metropolitan Cas. Ins. Co. N. Y. v. Colthurst, 36 Fed. (2nd) 559; affirmed 281 U. S. 746.

In the cited case, the policy provided (p. 560):

> "and if suits are brought to enforce such a claim the assured shall immediately forward to the company every summons, or other process, as soon as same shall have been served on him."

Process was not sent by the assured in the cited case to the insurance company, and default judgment was obtained just as in the case at bar.

In passing on this question, this Court, at page 561, said:

> "Appearing, appellant in its answer set up, among other defenses, the facts of Harris' failure to forward the summons and complaint in the Napa County suit. * * * The important consideration was that appellant should be advised of the service of process so that it could appear in response thereto, in the assured's name, and make defense. * * * In that view, admittedly, because of his default in not sooner forwarding the summons and complaint, Harris in case he had satisfied the judgment against him, could not have recovered upon the policy, and the question is whether or not, for like reasons, appellee is subject to the same disability. * * * While not all legally identical with the case before us, in principle and logically, we think these cases lend support to the appellant's contention that the injured person is under the same disability to which the insured would be subject should he pay the

judgment and seek indemnity under the policy. * * * The rule, as applied in some of the cases cited, is not without harsh consequences to the injured party. By the carelessness or wilful inaction of the insured, who is presumptively antagonistic one who has a just claim for damages may be defeated without any fault upon his part. Whether in such case the standing of the injured party is no better than that of the delinquent insured we need not here determine."

The point, however, was definitely determined by this Court in the recent case of

Royal Indemnity Co. v. Morris, 37 Fed. (2nd) 90, at p. 92.

At page 92 of that opinion, this Court said:

"That being true, the question remains whether the appellee (the injured third party) is in any better position. This question was expressly reserved in the Colthurst case (supra), but it now becomes necessary to decide it. Upon consideration, we feel constrained to answer it in the negative. Such is the weight of authority as appears from the citations in the Colthurst case. And see, also, Coleman v. New Amsterdam Casualty Co., 247 N. Y. 271, 160 N. E. 367, 369. Speaking of a statute of New York to which the provision of this policy in favor of the injured person conforms the Court of Appeals of New York in the Coleman case said: 'This statute was prompted by a definite mischief. * * * Before its enactment, the insolvency of the assured was equivalent in effect to a release of the surety. The policy was one of indemnity against loss suffered by the principal, and loss to him there was

none if he was unable to pay. The effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but also it is no greater. Assured and claimant must abide by the conditions of the contract.' We can see no escape from the reasoning of this and the other cases referred to in which a similar conclusion is reached, and it is equally applicable to the California statute. If the protection afforded by the statute is inadequate, that is a consideration for the Legislature and not for the Courts."

A material condition of the policy was violated, there can be no question that Hooper forfeited whatever rights he had under the policy.

Royal Indemnity v. Morris, supra.

The appellant, insurer, cannot be held liable beyond the terms of its insurance contract.

36 *Corpus Juris,* 1084.

There is some testimony in the record (Tr. p. 82) from A. L. Crawford, one of the attorneys for appellees, regarding a conversation had with Mr. Baraty three or four days after process had been served on Hooper. Mr. Crawford stated that process was served, about the 30th of January, 1928 (Tr. p. 82), while the records of the county clerk at San Mateo County show that process was served on Hooper March 28, 1927. (Tr. p. 31.) Mr. Crawford testifies that he told Mr. Baraty, one the attorneys of record

in this case, in the City Hall in San Francisco, of the service of process on Hooper, and that he was told by Mr. Baraty that he, Baraty was not interested. There is further testimony that before the default, Mr. Crawford had a conversation with Mr. Cresswell, Claims Manager of the appellant, who was a witness in this case.

As to the conversation with Mr. Baraty, we contend that the testimony was immaterial and inadmissible, as Mr. Baraty was not an officer of the appellant; the action against the named assured, Mrs. Kittredge, had been dismissed February 11, 1927 (Tr. p. 31), and under the opinion in the case of *Metropolitan Casualty Insurance Company of New York v. Colthurst,* supra, conversation with Attorney Baraty was inadmissible.

As far as the interview with Mr. Cresswell, Claims Adjuster of the appellant, no summons was ever delivered to him at the conversation, and considering the long delay between the service on Hooper and his default—nearly one year—it would seem to indicate that Mr. Crawford realized that Mr. Hooper had failed to comply with the terms of the policy, and that Mr. Crawford was trying to arrange a settlement. These interviews were denied by Mr. Cresswell.

The fact remains that the provision of the policy of appellant requiring that summons be delivered to it, was never complied with at all, and under the cited decisions of this Court, appellees are without remedy against appellant.

2. THAT ROY HOOPER FAILED TO RENDER TO APPELLANT ANY COOPERATION OR ASSISTANCE IN THE DEFENSE OF SAID SUPERIOR COURT ACTION.

The policy of appellant under the title "this agreement is subject to the following conditions" contained the following provisions in paragraph D. (Tr. p. 60.) "The assured shall at all times render to the Company all cooperation and assistance in his power and whenever requested shall aid in securing information and evidence and the attendance of witnesses and in prosecuting appeals."

The evidence is without contradiction that Roy Hooper after he was served with process failed to cooperate with this appellant in any manner whatsoever. Not only did he fail to notify appellant of service upon him of process but he allowed default judgment to be taken against him; he did not advise appellant of his address or whereabouts, nor did he do anything which would tend to assist appellant in the defense of that Superior Court action, and there is not one word of denial by Hooper or any one else to the testimony of the officials of appellant of this failure to cooperate.

Again, we say a material condition of this policy was violated and a forfeiture of whatever rights Hooper had thereunder occurred. The question of failure to cooperate has been recently decided by this Court in the case of

> *Royal Indemnity Co. v. Morris,* 37 Fed. Reports. 2nd 90, decided December 17, 1929, rehearing denied, January 29, 1930, affirmed 281 U. S. 748.

As a coincidence, Joseph A. Brown, one of the attorneys for the appellee in the case at bar, was the attorney for the appellee in the cited case.

The policy in the cited case provided "in the event of claim or suit covered by this policy the insured shall in no manner aid or abet the claimant but shall cooperate fully with the company, the Royal Indemnity Company, in the defense of such claim or suit."

The facts of the cited case were that Gomez, the driver who was in the same position as Hooper in the case at bar had failed to deliver the summons to the insurance company and had failed and refused to authorize or permit the insurance company to appear in his behalf in the defense of the action.

This Court in passing on this subject stated "upon the assumption that Gomez, as we hold, was an 'insured' it must be conceded, under the facts stipulated, that he violated a material condition of the policy in declining to permit any defense to be made to the action brought against him by the appellee * * *." This Court then determines that Gomez having forfeited his rights under the policy any person claiming through him likewise forfeited his rights.

Hooper in the case at bar under the provisions of the policy was under obligation to assist in whatever manner possible in the defense of said Superior Court action. He could not arbitrarily or unreasonably decline to assist in making any fair or legitimate defense, and as said by this Court in the last cited case: He could have at least legitimately challenged the amount

of the alleged damages and the proof required. This is made evident by the fact that in the complaint filed in the Superior Court of San Mateo County $10,000.00 was demanded as damages (Tr. p. 3) while in the default judgment obtained in that Superior Court, damages were allowed in the sum of $5324.00 and costs. (Tr. p. 29.) Under this heading we contend that the provision of the policy of appellant requiring co-operation on the part of insured or those benefited by the policy, was not complied with in any particular and that therefore the action against appellant must fall.

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3. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THE FACTS THAT ROY HOOPER WAS LEGALLY OPERATING SAID AUTOMOBILE WITH THE PERMISSION OF THE NAMED ASSURED, MRS. KITTREDGE.

Under this head, at the outset, we desire to point out that the complaint in the case at bar against the appellant is not based upon the proposition, that Hooper was operating this automobile with the permission of the named assured, Mrs. Kittredge. See Tr. p. 5, where in Paragraph VII of the complaint, it is alleged "that on or about the 8th day of August, 1926, the aforesaid automobile of Mary C. Kittredge * * * was maintained, managed and operated by one Roy Hooper, a chauffeur while in the course of his employment as chauffeur by said Mary C. Kittredge." The only testimony in the record with regard to any permission to use the automobile in question given by Mrs. Kittredge appears in the cross-examination of

witness Roy Hooper (Tr. p. 37), where the following testimony was given:

"On the 8th day of August, 1926, I had a conversation with Mrs. Kittredge at her residence; I asked her permission to go to the City and asked her if I could be released and if she wanted me for anything else; it was in the livingroom of her house on the ground floor; on that Saturday afternoon I asked her if she needed me anymore for the rest of the day and she said 'No;' I asked her 'May I go to the City,' and she said 'Yes.' Previously to that I turned and asked her if it was quite all right to use the Buick, and she said 'Yes, but be careful.' "

This is the only testimony in the record which would at all tend to show that Roy Hooper had permission to use this automobile at the time of the accident. It was hearsay testimony and at the time it was given Mrs. Kittredge had long since died. This testimony therefore could not be contradicted by her. It was self-serving.

Opposed to that testimony as to permission is the signed statement of Hooper himself given the day after the accident, to the effect that he had gone to San Francisco.

"On the afternoon of August 7th, this year, I asked permission of my employer, Mrs. Mary C. Kittredge for release from work for the rest of the day. She granted me this. I did not ask her permission to use either of her new automobiles and she did not instruct me not to use them. Whether or not she knew I had the automobile, I do not know, except that she

knew early Sunday morning when the accident was first reported to her.

* * * * * * *

I left my employer's place about 4 P. M. August 7th, 1926, in her Buick car and went to San Francisco in pursuit of my own purposes, which consisted of business and pleasure." (Tr. p. 43.)

There was further testimony of the gardener Bargass, to whom Hooper stated that Mrs. Kittredge did not know that he had taken the car. (Tr. p. 78.) There is the further circumstance that at the time of the present trial, there existed an unsatisfied judgment against Roy Hooper, in the Superior Court of San Mateo County in the sum of over $5000.00 as the result of this accident. It is our contention that hearsay evidence of this kind cannot be too carefully scrutinized by the Court and jury. It has been stated that this type of evidence is the most dangerous species of evidence that can be admitted in a Court of justice, and the one that is most liable to abuse. No matter how honest the witness may be the exact words in which statements are made are often times transposed and entirely different meanings conveyed. The slightest mistake of recollection may totally alter the admission or declaration, and more than this it is most unsatisfactory evidence on account of the facility with which it may be fabricated and impossibility, generally of contradicting it.

The Supreme Court of the State of California has oftentimes characterized hearsay testimony purporting to come from the lips of a deceased person as the weakest and most unsatisfactory type of evidence,

and that the ends of justice demand that such testimony should be satisfactorily corroborated.

On this subject, the *Estate of Emerson,* 175 Cal. 724, at p. 727, we find the following language:

> "This unsupported evidence of an oral agreement, made in the presence of nobody and evidenced by no writing, the court accepted to the fullest extent and ruled accordingly. It did this we regret to state in violation of positive law and against the overwhelming weight of the countershowing.
>
> "This subject matter, as indicated, falls under two heads: First, the weight of the evidence itself, assuming its admissibility; and, second, the question of its admissibility. First as to the weight of evidence. Preliminarily it is to be noted that the evidence is self-serving in that it exonerates the witness giving it from a liability to the estate of his deceased brother in the sum of nine thousand dollars with interest, which liability, saving for his own testimony, is fixed against him. Second, the evidence is of oral admissions against interest by a man whose lips are sealed in death. What, then, does the law say of such evidence (assuming now its admissibility)? The Code of Civil Procedure declares (section 2061, subdivision 4) that 'the evidence or oral admissions of a party ought to be received with caution by the jury.' In Mattingly v. Pennie, 105 Cal. 514, (45 Am. St. Rep. 87, 39 Pac. 200), this court in Bank said, 'No weaker kind of testimony could be produced.' Again in Bank (Austin v. Wilcoxson, 149 Cal. 24, (84 Pac. 417)) this court has said: 'It is not stating it too strongly to say that evidence so given under such

> circumstances must appear to any court to be in its nature the weakest and most unsatisfactory.' Says Lord Romilly, Master of the Rolls in Couch v. Hooper, 16 Beav. 182: 'It is always necessary to remember that in these cases, from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person.' Therefore, proceeds the learned judge, he has never experienced any difficulty in rejecting and disregarding such evidence. And, as Vice-Chancellor Van Fleet of New Jersey said (Lehigh Coal & Nav. Co. v. Central R. R. Co., 41 N. J. Eq. 167, (3 Atl. 134)) speaking of such witnesses as this special administrator: 'It is obvious that their position in the case makes it the duty of the court to examine their testimony with a jealous care and to scan it with a watchful scrutiny. They are masters of the situation and swear without fear of contradiction * * * The safe administration of justice demands that in such a case there should be either satisfactory corroborative evidence, or that the evidence of the living party should be so full and convincing as to persuade the court of its entire truth.' And finally, the text writers show that the courts are all in accord in thus weighing such evidence, and here suffice it to cite 2 Moore on Facts, secs. 877, 150 and 1166; 1 Taylor on Evidence, sec. 648; Wigmore on Evidence, secs. 578, 2065."

The very recent case of *Smellie v. S. P. Co.,* 79 Cal. Dec. 316, decided April 1, 1930, at page 324 of that decision the following language is used:

"A third inherent weakness to be found in the testimony of Ireland is that it purports to give the statements or declarations of a deceased person. Regarding testimony of this character, this Court said: 'The evidence is of oral admissions against interest by a man whose lips are sealed in death. What, then, does the law say of such evidence (assuming now its admissibility)? The Code of Civil Procedure declares (sec. 2061, subd. 4) that 'the evidence of oral admissions of a party ought to be received with caution by a jury.' In Mattingly v. Pennie, 105 Cal. 514, this Court in bank said, 'No weaker kind of testimony could be produced.' Again in bank (Austin v. Wilcoxson, 149 Cal. 24) this Court has said: 'It is not stating it too strongly to say that evidence so given under such circumstances must appear to any Court to be in its nature the weakest and most unsatisfactory.'" (*Estate of Emerson,* 175 Cal. 724, 727.)

Our contention, therefore, under this subdivision is that hearsay evidence of a person long since deceased, coming from Hooper on cross-examination, uncorroborated in any way, but in fact positively contradicted, by testimony written and oral, together with a statement over the signature of Mrs. Kittredge in which she states positively, that the car was taken without her permission—this letter was refused in evidence (Tr. p. 65), is not sufficient evidence under the authorities to establish permission to use the automobile in question; and furthermore the pleadings in this case, as made by the appellees themselves, are not based upon any allegation of permission.

4. THAT THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THE FACT THAT ROY HOOPER WAS OPERATING SAID AUTOMOMILE IN THE COURSE OF HIS EMPLOYMENT AS CHAUFFEUR FOR MRS. KITTREDGE AS ALLEGED IN THE COMPLAINT.

This is the allegation upon which the appellees base their action. There is not one single word in the entire evidence to the effect that Mrs. Kittredge asked Hooper to deliver a package for her to the Fairmont Hotel. Hooper goes no further than to testify that the nurse gave him a package but whether it was for Mrs. Kittredge or for the nurse or whether it was to be delivered to a friend of Mrs. Kittredge or of the nurse he will not state; he does not know the contents of the package, does not know to whom he delivered it, he received no receipt therefor; at one stage in his testimony, on cross-examination when he was asked concerning his leaving the ranch for San Francisco (Tr. p. 39), he describes his trip from the time he left the ranch to the time he arrived at the garage in San Francisco, leaving the machine there while he had his dinner and spent the evening at a theater, then returning to the garage from which place he took the machine to return home and not one single word was said by him concerning the delivery of a package until that matter was brought to his attention by a question.

This testimony as to the agency theory, as alleged in the complaint, is on a different basis from that of the permission theory set forth in the last subdivision. On the agency theory there is no attempt at all to prove that Hooper came to San Francisco to deliver a package for his employer, Mrs. Kittredge. In con-

nection with that failure of proof, consideration and weight must be given to his signed statement heretofore mentioned and to his statement made to Bargas concerning the taking of the automobile without the permission of Mrs. Kittredge.

The elements necessary to establish a cause of action on the grounds of *respondeat superior* are absolutely lacking.

Lane v. Bing, 202 Cal. 577;

Kish v. Calif. State Automobile Assn., 190 Cal. 246.

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5. INSTRUCTIONS GIVEN AND REFUSED.

Eight instructions were proposed by defendant. Of this number five were refused. (Tr. pp. 92-97.)

The instructions given by the Court are nine in number, of which numbers 1, 2 and 3 were proposed by defendant, number 7 proposed by plaintiffs, and the balance given by the Court. (Tr. pp. 94, 95 and 96.)

A party to an action is entitled to propose instructions presenting his theory of the case based upon the pleadings and proof. In the case of *Murero v. Rhinehart Lumber Company,* 85 Cal. App. 385, at 387, it was said:

> "Just as it was the duty of the court to instruct the jury giving all proper instructions supporting the theory of the plaintiff, it was equally the duty of the court to give to the jury all proper instructions supporting the theory of the defendant."

Instruction No. 5 given by the Court of its motion (Tr. p. 95), read as follows:

> "Under the provisions of the policy, plaintiff's claim to recovery is, first, that Hooper was driving the Buick car with the permission of the insured owned, and second, that the conditions of the policy with respect to suit were complied with."

We respectfully submit as pointed out above that the plaintiff's complaint was not based upon the theory of permission but was based upon the theory that Hooper was operating the car in the course of his employment. It is the contention of appellant that appellees failed to prove employment and that the question as to whether or not Hooper obtained the permission of Mrs. Kittredge was not the basis of the action. This instruction, therefore, should not have been given.

The same argument applies to instruction No. 8 given by the Court of its own motion. (Tr. p. 96.)

The same argument also applies to instruction No. 6 given by the Court of its own motion. (Tr. p. 95.)

Instruction No. 3 proposed by the appellant (Tr. p. 92) we believe, should have been given in view of the character of the evidence produced by the appellee. That instruction would have pointed out to the jury the necessity that the plaintiffs' evidence must be of greater weight, quality and convincing effect than that produced by the defendant and that if the plaintiffs failed to prove the allegations of their complaint by a preponderance of the evidence they can-

not recover. We believe the instruction should have been given under all the circumstances of this case.

Instruction No. 6 proposed by the appellant (Tr. p. 93)—appellant requested that the jury be instructed that if Hooper was operating the automobile without permission and was not operating it on the business or on behalf of Mrs. Kittredge then the plaintiffs could not recover.

This instruction was not given in substance anywhere. There is not one single instruction given to the jury which advised them that, following the allegations of the complaint, the plaintiff would have to prove that at the time of the accident Hooper was driving the automobile on the business of or on behalf of Mrs. Kittredge. This proposed instruction not only set forth the plaintiffs' theory of the case but also set forth the defendant's theory as alleged in the special defense in its amended answer. It should have been given.

Instruction No. 8 proposed by appellant (Tr. p. 93) was based upon the theory of appellant as set forth in its amended answer that Hooper had failed to cooperate and assist in the defense of the action brought against him. Nowhere in the instructions given by the Court is there a single word stated as to the necessity of cooperation and assistance as required by the terms of the policy on the part of Hooper.

Instruction No. 9 given by the Court (Tr. p. 96) covers the proposition of the delivery of process or summons or complaint to the insurance company but

does not contain a single word as to the necessity of cooperation and assistance in the defense of an action. We respectfully submit that the jury should have been instructed on this special defense which was pleaded by the appellant and in support of which evidence was introduced, uncontradicted.

Instruction No. 1 proposed by the appellant (Tr. p. 92) was for a directed verdict in favor of the appellant.

The correctness of any one of the foregoing contentions made by the appellant would require the giving of that directed verdict.

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6. THE APPELLANT SHOULD HAVE BEEN GRANTED PERMISSION TO INTERROGATE THE JURY AFTER THE DISCOVERY OF THE FACT THAT THE WIDOW HAD REMARRIED OR THAT A MISTRIAL SHOULD HAVE BEEN DIRECTED BY THE COURT.

From the record it is made to appear that Mrs. Forrest at the outset of the case and throughout its trial until she was called as a witness presented herself as the widow of Claude E. Forrest. No intimation was given that she had remarried and in fact she still maintained that her name was Belva Forrest when she was sworn as a witness on rebuttal and only after a series of questions did she divulge the fact that she had remarried, gave the name of her present husband and his occupation.

For aught that appears some of the jurymen might know the present husband or they might be connected in some way with the firm in which he is employed.

We believe that the appellant should have been given an opportunity then and there to interrogate the jury on this question, particularly when it was made to appear that the appellant had kept from everyone in the Court room the fact that she was remarried and the name, residence and occupation of her present husband. We do not believe under all of the circumstances that the penalty of a mistrial would be too severe.

Subdivisions 7 and 8 of the appellant's contentions concern the motion for a new trial and the motion made for a directed verdict. The points involved, we believe, have sufficiently been presented under the foregoing contentions.

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9. EXHIBIT "C" FOR IDENTIFICATION, REFUSED ADMISSION IN EVIDENCE.

Appellant offered in evidence a letter addressed to it on September 26, 1926, by Mary C. Kittredge.

Objection was made to its introduction and it was marked defendant's Exhibit "C" for identification. It was in the following words (Tr. pp. 64 and 65):

> "Saratoga, Sept. 26, 1926.
>
> Indemnity Insurance Co. of N. America
>
> Gentlemen:
>
> Referring to the accident in the early part of August when the unfortunate death of a pedestrian occurred through being hit by my Buick sedan while being driven by Roy Hooper, the fact is that the car was being used by him that night without my knowledge or permission. As I learned after the accident, he took the car

secretly and drove from Saratoga to San Francisco for his own private purposes entirely; and it was while he was on his way back to Saratoga in the early hours of the morning that the accident occurred. He was allowed to have Saturday nights free as a rule; and was in the habit of going those evenings to San Jose. For that purpose he had general permission to use a Ford runabout; but his express instructions were that he should never use the Buick sedan without first obtaining special permission. On the evening in question he took the car without permission, nor did I know that he had taken it until I was informed of the accident on the following day. Neither did I know of any intention on his part to go to San Francisco.

Mary Kittredge."

We contend that the Court erred in refusing to admit this letter in evidence. The record shows that the accident in question occurred on the 8th day of August, 1926; that the suit was commenced in San Mateo County on the 13th of October, 1926; that Mrs. Kittredge died on the 20th of October, 1926. The letter in question was written September 26, 1926, at a time when no lawsuit was pending against Mrs. Kittredge. It was written by Mrs. Kittredge in the performance of a duty specially required by her under the contract of insurance—namely, to report all accidents and give all information available, and it was made against her interest because in this notice to the insurance company, the appellant here, Mrs. Kittredge advised the company that Hooper had no permission to use the automobile in question. The insurance company therefore, under her own admis-

sion, would not have been obliged to indemnify her or protect her in an action where it was claimed that Hooper was using the car with her permission. The letter, therefore, was one made against her interests.

Certain writings and declarations made by a deceased person are admissible.

Section 1946, Code of Civil Procedure, provides:

> "Entries of decedents. Evidence in specified cases. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:
>
> 1. When the entry was made against the interest of the person making it.
>
> 3. When it was made in the performance of a duty specially enjoined by law."

We contend that this letter written by Mrs. Kittredge was admissible under section 1 and section 3 of this code section. It was made against her interests and it was made in the performance of a duty imposed by law that is, imposed under the terms of this contract of insurance.

Section 1870, Code of Civil Procedure, provides:

> "Facts which may be proved on trial. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 2. The act, declaration, or omission of a party, as evidence against such party;
>
> 7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty."

Section 1850, Code of Civil Procedure, referred to above, reads as follows:

> "Declarations which are a part of the transaction. Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction."

The fact in dispute here is the permission to use this automobile.

Section 1853, Code of Civil Procedure, provides:

> "Declaration of decedent evidence against his successors in interest. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

That Mrs. Kittredge had knowledge of the fact that no permission was given, there can be no doubt. This knowledge she imparted to her insurance carrier as required under the provisions of the policy and she did this at a time prior to the institution of any lawsuit.

Were she alive at the time of the trial her testimony would have been a complete answer to the faint evidence given by Hooper, and would have been corroborated and is corroborated by the signed statement of Hooper made himself the day following the accident to investigator Browne and his statement as to permission made to the gardener Bargas the morning after the accident.

We respectfully contend under this subdivision that defendant's exhibit "C" for identification should have been admitted in evidence. With that letter before the jury, with the signed statement of Hooper as to his actions in coming to San Francisco as given to investigator Browne and with his statement made to Bargas we contend the testimony of Hooper that this lady now deceased permitted him to use the automobile would be of no avail. That evidence of declarations of deceased persons coming from the unsupported testimony of a single person, as to a conversation between himself and the deceased person has time and again been characterized by the Courts as the weakest of all kinds of evidence. In this action we have the weakest kind of evidence, and if you please, given by deposition, and against this the sworn, positive evidence of two witnesses and two written documents disproving the alleged declaration of a deceased person.

Under the code sections in this state this letter written by Mrs. Kittredge in compliance with the requirements of her contract with the insurance company and against her interests should have been admitted in evidence.

Appellant respectfully asks that the judgment entered on the verdict be reversed.

Dated, San Francisco,
September 29, 1930.

HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Appellant.

7

No. 6165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (a corporation),

Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST (a minor), by Belva Forrest, his guardian ad litem,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

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Attorneys for Appellees.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 6165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (a corporation),

Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST (a minor), by Belva Forrest, his guardian ad litem,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT OF FACTS.

In making anew a statement of appellees' version of the facts in this case we explain in doing so that it is because of the incompleteness of the presentation by appellant and the necessity for correcting what appears to appellees to be an erroneous version of the case.

At the outset we wish to emphasize that the amendment to the answer was allowed after the trial started and over the objection of appellees, on the 11th day of February, 1930. (Transcript of Record, page 28; also Transcript of Record, page 91.)

The defenses interposed in the amended answer are lack of notice, failure by the insured to personally deliver the copy of the summons and complaint in the original action of *Forrest v. Kittredge and Hooper,* and lack of cooperation.

Until after the trial started there was no suggestion that any such defense was to be urged by the appellant in this case.

The testimony of Hooper was presented by deposition only, taken October 15, 1929. (Transcript of Record, page 32.)

It will thus appear that on the taking of the deposition of Hooper no testimony was elicited from the witness on either side relative to the issues presented in the amended answer, and the record shows that Hooper was absent from the trial and unavailable as a witness. Hence appellees assert this Court should view the case in the light of these circumstances and that this statement of said facts is deserving of consideration on this appeal.

This case arises out of the following facts. Roy Hooper was a chauffeur for Mrs. E. H. Kittredge some time prior and subsequent to August 8, 1926. On that day, while Hooper was driving an automobile belonging to Mrs. Kittredge and while a chauffeur in her employ and being paid a salary, he accidentally killed one Claude Estell Forrest in the City of Atherton, California.

A suit was brought in the Superior Court of San Mateo County to recover damages arising out of said accident, against both Hooper and his employer, Mrs.

E. H. Kittredge. Shortly thereafter Mrs. E. H. Kittredge died and the action continued against Hooper.

Judgment was obtained by default against Hooper long after appellant received a copy of the summons and complaint—after due notice to the insurance company, appellant herein,—which will be hereinafter more particularly indicated,—and after due notice to the insurance company that such judgment would be taken, and first affording the insurance company, appellant herein, full opportunity to defend said case, of which they had full and exact knowledge.

With this statement of facts, we will proceed to discuss the contentions presented by appellant and being nine in number, in the order in which they are found in appellant's brief.

I.

CONSIDERING APPELLANT'S CONTENTION THAT ROY HOOPER FAILED TO FORWARD TO APPELLANT THE PROCESS SERVED UPON HIM.

We respectfully submit that in presenting this point appellant has ignored the evidence. It appears from the testimony of the witness A. L. Crawford (Transcript of Record, pages 82 to 87):

> "I am an attorney at law, practicing since 1917 in San Francisco and Palo Alto. I am one of the attorneys for the plaintiff in this case and was one of the attorneys for the plaintiff in the case of Forrest et al. vs. Hooper and Mrs. Kittredge. I remember about the time that Mr. Hooper was served with summons here in this city and county.

Q. Did you have any conversation within three or four days after the service of summons on Roy Hooper, with Mr. Gus L. Baraty, one of the attorneys of record in that case?

A. I did. At that conversation besides myself and Mr. Baraty, there was present Mr. Joseph A. Brown, one of the attorneys for plaintiffs in this case, and the conversation took place on the 4th floor of the City Hall.

Q. What was that conversation?

A. The conversation at that time between myself and Mr. Baraty and yourself was to the effect that we had served Hooper about the thirtieth day of January, 1928, and we (62) told him the incident surrounding the serving of Mr. Hooper and how it had taken such a long time to get in touch with Hooper. At that time I told Mr. Baraty that Mr. Hooper could be reached through 585 Geary Street, Hotel Heuer, this city. And that, furthermore, we thought that he was then at Mills Field, and that we would do all in our power to assist in the matter and told Mr. Baraty to take it up with the company.

Q. And what did he say?

A. Mr. Baraty said at that time that he was not interested in litigation and was not providing business for himself. I believe that was the term. That was the substance of the conversation.

Q. But he said that he would take it up with the company?

A. He did, also.

Q. And in the meantime no action was taken?

A. There was no action taken at that time.

Q. Did you see Mr. Baraty again before this default was entered?

A. Yes, I saw Mr. Baraty again.

Q. Do you remember where that was?

A. It was in the courtroom of what I believe is now the courtroom of Justice of the Peace Cornelius Kelly.

Q. That was on the third floor of the City Hall?

A. That was on the third floor of the City Hall, this city and county. At that time I again reminded Mr. Baraty, and asked him what he was going to do, and I told him that we had taken default of Mr. Hooper, but that we would give him ample opportunity to search plenty.

Q. Was anything said about what the Indemnity Insurance Company of North America had said?

A. Mr. Baraty at that time said that he had taken it up with the insurance company and that they were not interested. I believe those were the words that he used.

Q. *Now, then, thereafter and before the default was entered in this case, did you have a conversation with Mr. Cresswell, of the insurance company?*

A. *I was in the office of the Indemnity Insurance Company of North America, and——*

Q. *Located where?*

A. *I think it is located at 206 Sansome Street, this city and county, and I believe it is on the second floor. At that time I spoke to Mr. Cresswell.*

Q. Who was present?

A. I believe Mr. Cresswell and myself were in Mr. Cresswell's little office.

Q. *And that was before default was entered?*

A. *That was prior to the entry of the default.*

Q. *What was said? What was the conversation between you and Mr. Cresswell?*

A. At that time I told Mr. Cresswell that *we were going to take the default of Mr. Hooper, but that we would give them some time yet. Mr. Cresswell said to me at that time that they were not interested; that they had a good defense to this suit; to go ahead. After some more conversation he stated that he had several statements. What they were, I do not know.*

Q. Now, then, did you enter the default after that? Some time after?

A. *I believe that I entered the default about three weeks subsequent to that time.*

Q. *Now, then, did you have a conversation with Mr. Cresswell after the default had been entered?*

A. I did.

Q. In the same office?

A. The same office, on the same floor.

Q. What persons were present?

A. Myself and Mr. Cresswell.

Q. What did you tell him?

A. *I told Mr. Cresswell at that time that we had taken the default and that judgment had been entered. I further told him that if he wanted to, we would set aside the default judgment, and that a trial could be had upon the merits.*

Q. Was that the—all the conversation you had with him?

A. I have had several conversations since that time.

Q. With whom?

A. With Mr. Cresswell.

Q. At the same place?

A. At the same place.

Q. What was the next conversation?

A. Along the same tenor. There was one other thing in which I was involved which has nothing

to do with this action. To that effect. It was about two or three weeks later that I had the first conversation with Mr. Cresswell, and then I had a few conferences with Mr. Cresswell later on." (Italics all ours.)

The only attempted denial of this testimony, that of the witness Cresswell, is as follows (Transcript of Record, page 80):

"At the present time, and for some time prior to August, 1926, I have been the Pacific Coast Claim Manager of the Indemnity Insurance Company of North America, the defendant in this action. I am familiar with the action pending in San Mateo County, entitled Belva Forrest et al. against Kittredge and Hooper.

Subsequent to the service of process in that action upon Roy Hooper, Roy Hooper did not ever confer with me; at no time. He never delivered to me a copy of the process in that San Mateo action.

Q. Now, you know Mr. Crawford, one of the attorneys for the plaintiffs here?

A. Yes, I do.

Q. Do you know any conversations, and by that I mean more than that one, relative to the fact that Hooper had been served in the San Mateo action, and the request by Mr. Crawford upon you and through your company that they were defending for Hooper?

A. No, I do not.

Q. You do not remember any such conversation?

A. No. I do not.

Q. Mr. Crawford has been in your office?

A. Yes, he has, on other matters though, as I recall."

At this point it will be noticed that the only testimony attempting to show that no process was delivered to the company is from the mouth of the witness Cresswell in the following language:

> "Subsequent to the service of process in that action upon Roy Hooper, Roy Hooper did not ever confer with me; at no time. He never delivered to me a copy of the process in that San Mateo action."

The only other attempt to prove lack of delivery of the summons comes from the testimony of the witness Forsyth (Transcript of Record, pages 65 and 66):

> "I knew of the existence of the action referred to that was pending in San Mateo County, and which has been mentioned in this case, in which Mrs. Forrest and her son were plaintiffs and the Indemnity Insurance Company of North America, and Roy Hooper and others, were defendants. I knew of the existence of that suit, *because the papers in that suit were forwarded to us by the assured, Mr. Kittredge.* That was the action that was afterwards dismissed as against Mrs. Kittredge on account of her death.
>
> Q. Were you ever notified by Roy Hooper, the chauffeur, that process had been served upon him in the action pending in San Mateo County?
>
> A. No."

In this connection it should be noted that the language of the policy requiring delivery of the process provides (Transcript of Record, pages 59 and 60):

> "*Notice and Settlement.* D. In the event of accident, the Assured shall give prompt written notice thereof to the Company or to one of its duly authorized agents, and (1) forward to the

> Company forthwith after receipt thereof every process, pleading or other paper of any kind relating to any and all claims, suits or proceedings. The assured shall at all times render to the Company all co-operation and assistance in his power, and whenever requested, shall aid in securing information and evidence and the attendance of witnesses and in prosecuting appeals."

It will thus appear from both the testimony of Mr. Forsyth and Mr. Cresswell that they had full knowledge of the pendency of the action in question and copies of the summons and complaint. (Transcript of Record, pages 65 and 66.)

In other words, the situation amounts to this: A. L. Crawford testified positively that he notified Mr. Cresswell of the service of the summons upon Hooper, of the time when the appearance was due in the action, of the intention to enter the default, and Cresswell definitely stated, according to the testimony of Crawford, that the company did not desire to defend the action but intended to rely upon other matters of defense.

The testimony shows that a copy of the summons served upon Mrs. Kittredge was forwarded by her to the company; that the company was fully advised of the pendency of the action and had the pleadings in the case.

The record also shows that the company had prompt advice of the accident. Mr. Browne, representing the insurance company, testified (Transcript of Record, pages 67 and 68):

"I reside in San Francisco. At present I am not employed. I was formerly employed by the defendant, the Indemnity Insurance Company of North America, in the capacity of claims adjuster and investigator of automobile accidents. In that capacity I investigated the Hooper-Forrest accident. As soon as I was advised that the accident had taken place—I believe it was the next day—I went to Saratoga where Mrs. Kittredge lived, and she related the facts of the accident to me in so far as she knew them.

I first saw Roy Hooper in connection with this accident at the coroner's inquest at Palo Alto, but I did not have any conversation with him until after the inquest. I arrived at the inquest during the latter part of his testimony. After the inquest had concluded I wanted to get Roy Hooper's version of the accident, and all the details concerning it, so I asked him if he would go with me to some place where we could talk it over. We did not want to stand on the street and talk, so we went to Wilson's Candy Store. I drew a diagram of the accident. There was no one else with us during our conversation that afternoon."

The evidence shows that Mr. Browne, investigator for the insurance company, was on the scene of the difficulty the very next day and got a report from Mr. Hooper of what he claims was Hooper's version of the accident, although Hooper testified that this version was incorrect, and Mr. Brown admitted that he had used and employed his own language in putting down what he deemed to be the meaning and intent of the witness Hooper (Transcript of Record, page 75):

"Q. Now, then, Mr. Browne, have you got in that statement anything to the effect that he took the automobile? Let's see the statement. You have in that statement this language: 'She granted permission to take it.' You have that in here. Mrs. Kittredge granted the permission to take it that day.

A. Got it at four o'clock, and——

Q. And that he did not ask her permission to use the car and he didn't know whether she knew it or not?

A. That is true.

Q. But he didn't tell you that he used it of his own accord and of his own volition? Did he use those words?

A. He didn't use the words 'accord and volition.' He said he took the car.

Q. What he did say, according to your best recollection, is what you have written down here?

A. I remember what he told me. He told me so much as I have written down.

Q. That is your own language, the thought that was conveyed to your mind in describing what he said to you?

A. That is quite right."

It thus affirmatively appears from the record:

(a) The company was immediately advised of the accident.

(b) The very next day—in a few hours after the accident occurred—the adjuster and investigator of the insurance company was on the ground and secured the facts of the accident.

(c) That Hooper gave all the cooperation possible.

(d) That Mrs. Kittredge gave all the cooperation possible.

(e) That after the suit was brought and the summons and complaint was served, Mrs. Kittredge immediately forwarded the summons and complaint to the company.

(f) That after the summons and complaint was served upon Hooper the company was immediately advised of that fact and given every opportunity to defend the case and positively declined so to do.

(g) That the policy required notice of the accident to be given to the company, and that the office of the company is shown by the policy to be in Philadelphia (Transcript of Record, page 55), and that not a word of testimony was introduced into the record that full compliance with the provisions of the policy was not made by both Hooper and Mrs. Kittredge.

For the foregoing reasons we respectfully urge that none of the cases presented by appellant in support of the defenses discussed under this heading have any weight.

We think that the language in the case of *Royal Indemnity Co. v. Morris,* 37 Fed. Rep. (2d) page 90, at page 91, fully disposes of this contention:

> "It is further stipulated that service of the complaint and summons in the action was made on Gomez on January 12, 1928, and on the same day counsel for the plaintiff mailed to appellant copies of the complaint and summons with the date of service endorsed thereon, all of which appellant received on January 12th. Also that on January 11th the Hertz Drivurself Stations, Inc., one of the companies named as the insured in the policy, forwarded to appellant copies of the com-

plaint and summons. And it is still further stipulated that the appellant was given timely notice of the automobile accident. In view of these facts, it is no defense that Gomez did not in person forward copies of the complaint and process. Slavens v. Standard Accident Ins. Co. (C. C. A.), 27 F. (2d) 859, and the Colthurst Case, supra."

It being that the company had copies of the summons and complaint immediately, that they were advised of the service of the same upon Hooper and were given every opportunity to defend the case, and that no evidence was introduced by defendant and appellant herein to show that no summons or complaint was forwarded to the office in Philadelphia, the defendant company has failed to sustain any defense.

II.

THE SECOND POINT PRESENTED, THAT HOOPER FAILED TO EXTEND COOPERATION TO APPELLANT IS CERTAINLY DISPOSED OF BY THE FOREGOING AND NEEDS NO FURTHER DISCUSSION.

III.

THE CONTENTION THAT THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT HOOPER WAS LEGALLY OPERATING THE AUTOMOBILE WITH THE PERMISSION OF MRS. KITTREDGE.

The permission that Hooper had to operate the automobile was twofold. The policy provides that it covers persons (Transcript of Record, page 58):

* * * * * * *

"while riding in or legally operating any automobile described in the Declarations and any person, firm or corporation, legally responsible for the operation thereof (exception always a public garage, automobile repair shop and/or sales agency and/or service station and agents and employees thereof) provided such use or operation is with the permission of the named Assured or, if the named Assured is an individual, with the permission of an adult member of the Assured's household other than a chauffeur or domestic servant;"

It is appellees' contention that Hooper had permission from both Mrs. Kittredge and the nurse of Mrs. Kittredge to use the automobile on the occasion in question, and that the testimony of Hooper is not in any way weakened or impaired or controlled by the alleged rule invoked. Appellees believe that the testimony of a person based on the declarations made by a deceased person is not in any way applicable.

Hooper claims that Mrs. Kittredge gave her instructions to him through the medium of the nurse of Mrs. Kittredge—whom no one contends is dead, and whom no one contends was not available as a witness—and also by Mrs. Kittredge herself. The testimony of Hooper, given by deposition, material to the point in question is as follows (Transcript of Record, pages 32, 33, 35, 36, 37, 38 and 39):

"I reside at Glendale. On August 9, 1926, I was employed by Mrs. E. H. Kittredge, of Saratoga, as chauffeur. I had been so employed by her continuously since April, 1926, at a monthly salary of $140.00; my employment was discon-

tinued August 11, 1926; I drove a 1926 Master Six Buick Sedan that belonged to Mrs. E. H. Kittredge; I had driven it continuously from the time I entered her employment; I had an accident with this automobile on August 9, 1926, at about 2:30 A. M. at Atherton, when I struck Claude Forrest, the father of this child, and husband of this widow.

Mrs. Kittredge was my employer and was the one who employed me to drive the Buick Sedan, and who was paying me the $140.00 for driving the car; the conversation had with her was approximately at 4:30 in the afternoon at her place in Saratoga, and I believe the nurse was present at that conversation; I do not know the name of the nurse; when the nurse handed me the package with instructions to deliver it, Mrs. Kittredge was sitting in the library adjoining the living-room; I told Mrs. Kittredge I would return early in the evening before twelve o'clock, if possible; I said I was going to a theater in San Francisco afterwards; I asked her permission to take the Buick Sedan, and thereupon I took the Buick Sedan and went to San Francisco under those conditions; I left San Francisco around twelve o'clock; at the time of the accident I was going south on the State Highway somewhere in the vicinity of Atherton at the time I struck this man, Claude Estell Forrest, and found out afterwards at the hospital in Palo Alto that he was dead.

I saw Mrs. E. H. Kittredge on August 8, 1926, at about 4:30 in the afternoon at her ranch at Saratoga. I had a conversation with her in regard to coming to the city. I think the nurse was present, but I do not remember her name.

* * * * * * *

Q. What did she say to you?

A. I asked her permission to go to the city Saturday afternoon at 4:30, and in so doing, I delivered a package handed to me by the nurse—whether it was Mrs. Kittredge's package being sent there or not,—the nurse handed it to me, and I delivered it to the Fairmont Hotel, and I can't say whether it was from Mrs. Kittredge or the nurse.

* * * * * * *

I told Mrs. Kittredge that I would be back early in the evening, before twelve if possible, and I said I was going to the theatre in San Francisco, and asked her permission to take the Buick Sedan. I drove to San Francisco, and left there about twelve.

Cross-Examination.

I was employed by Mrs. Kittredge April 25, 1926, as chauffeur to drive her wherever she wanted to go.

Q. Now, on the 8th day of August, 1926, you say you had a conversation with Mrs. Kittredge at her residence?

A. Yes, I asked her permission to go to the city and I asked her if I could be released, and if she wanted me for anything else.

Q. Was she a well woman at that time, or was she sick?

A. She hadn't been in good health ever since I had been in her employ.

Mrs. Kittredge had a Buick Sedan and a Ford Roadster; it was my business to drive the Buick, but not the Ford; on the 8th day of August, 1926, I had a conversation with Mrs. Kittredge at her residence; I asked her permission to go to the city and asked her if I could be released and if she wanted me for anything else; it was in the

living-room at her house on the ground floor; on that Saturday afternoon I asked her if she needed me any more for the rest of the day and she said 'No;' I asked, 'May I go to the city?' and she said 'Yes.' Previously to that I turned and asked her if it was quite all right to use the Buick and she said, 'Yes, but be careful;' then I dressed myself and got into the car and left the ranch for San Francisco. The nurse gave me the package and I delivered it—whether it was Mrs. Kittredge's or the nurse's friend, I don't know that—they had so many friends, I didn't know one from the other, as far as their names were concerned. I don't know the name of the nurse. The first time I ever saw her was when I came to work there. I don't know her first name; I never heard her called by name. The package the nurse gave me was about six inches long and an inch and a half wide. It was wrapped in regular department store wrapping papers. The nurse was always with Mrs. Kittredge, because Mrs. Kittredge could not see very well. The nurse told me to deliver the package at the Fairmont Hotel, to the address on the package. I don't know the name; I didn't know what was inside the package; I was not told; Mrs. Kittredge did not say what was inside the package.

Q. On this occasion, did Mrs. Kittredge ask you to deliver this package to the Fairmont?

A. It was handed to me by the nurse, and I presume the nurse was told by Mrs. Kittredge to do so—Mrs. Kittredge did not tell me.

Q. Mrs. Kittredge did not tell you anything in reference to that package?

A. No. Mrs. Kittredge did not ask me to deliver the package to the Fairmont. Nurse generally gave me all the stuff when it was to be

delivered and anything to be taken anyplace—Mrs. Kittredge left that all to the nurse to be taken care of. The package was wrapped in regular department store wrapping paper; the nurse gave me the package standing in the living-room door in front part of the house, entering the front yard; the nurse was in the same room with Mrs. Kittredge; she was always with Mrs. Kittredge because she—Mrs. Kittredge—couldn't see very well; the nurse told me to 'deliver the package to the Fairmont Hotel, if you will, please.' I told Mrs. Kittredge that I would like to go to San Francisco to the theater. I went there because that is where Mrs. Kittredge always kept the car when she was in the city and also when she was at the Stanford Apartments on California Street, and she did all her trading there; my purpose in taking the car there was to leave the car there for the evening. *The storage for the car that evening went on Mrs. Kittredge's bill. I did not pay for that.* (Italics ours.)

Q. When you spoke to Mrs. Kittredge you asked her if you couldn't be released for the day?

A. Yes.

* * * * * * *

Q. What did you do with this package that the nurse had given you?

A. Delivered it to the Fairmont Hotel.

Q. When?

A. That evening.

Q. When about, on the evening?

A. About—I don't know the exact time that I delivered it there.

Q. You haven't any idea what time that evening you delivered the package to the Fairmont Hotel?

A. No. I went up there and turned and came right away from there."

No attempt was made on the trial to prove that the storage on the car at the Abbey Garage on this occasion was not charged on Mrs. Kittredge's bill.

We submit, in view of this testimony, there was overwhelming evidence that Hooper was lawfully driving the car, with the permission and consent of Mrs. Kittredge given by and through the nurse, an adult member of the household, whom the witness testified always gave the orders for Mrs. Kittredge, and that eliminates and utterly demolishes the contention of appellant that this testimony comes within the rule of an oral declaration of a deceased person.

IV.

THE CONTENTIONS UNDER THIS HEADING ARE ALSO DISPOSED OF BY THE ARGUMENTS UNDER POINT III.

V.

APPELLANT URGES THAT CERTAIN INSTRUCTIONS GIVEN AND REFUSED WERE SO GIVEN AND REFUSED ERRONEOUSLY.

We are of the opinion that no compliance with Rule 41 of the United States District Court was made by appellant, and that any such alleged contention cannot be considered on this appeal.

It appears in the transcript of record at page 97, as follows:

"Mr. Baraty. The defendant excepts to the giving of instruction Number VII proposed by plaintiffs, on the grounds that the instruction is not warranted by the pleadings, inasmuch as there is no pleading alleging that permission was given to use the automobile.

The Court. And you do not object to the instruction given by the Court on the subject of notice?

Mr. Baraty. No, I object to the instructions given by the Court generally.

The Court. In the Federal Court you have to specify the particular instruction.

Mr. Baraty. My objection is to any instruction given with reference to permission, that it is not within the issues pleaded.

The Court. As to that instruction, your exception is sufficient."

Rule 41 (page 20, Rules, United States District Court) provides:

"Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the Court, before the jury have retired, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to, and specifying the grounds of such exceptions. As to the charge given by the Court of its own motion, the grounds of exception shall be specific; as to instructions requested by the parties the grounds may be general. The Judge shall note such exceptions in the minutes of the trial or cause the

reporter (if one is in attendance) so to note the same. If, after the jury have retired to deliberate upon their verdict, they return into the Court and request further instructions, the Court may, in the absence of Counsel, give such instructions, and such instructions shall be deemed excepted to by each party."

We therefore think that the complaint as to this instruction in this case cannot be heard at this time, in view of the state of the record.

There is surely only one single conceivable properly reserved exception as pointed out by the Court, and that was to the instruction given on the subject of permission. It would seem that instruction No. 8 completely meets this complaint and disposes of appellant's contention.

VI.

THE CONTENTION THAT APPELLANT SHOULD HAVE BEEN GRANTED PERMISSION TO INTERROGATE THE JURY.

No authority is presented in support of that point. No argument is presented to indicate where any harm or injury did or could arise from this situation.

VII and VIII.

APPELLANT'S POINTS VII AND VIII ARE PRACTICALLY ABANDONED AND ARE SUBMITTED TO THE GENERAL ISSUES ALREADY FULLY COVERED IN THIS CASE.

IX.

APPELLANT'S CONTENTION THAT EXHIBIT "C" FOR IDENTIFICATION SHOULD HAVE BEEN RECEIVED IN EVIDENCE.

The letter in question is claimed to have been written a month and eighteen days after the accident and prior to the institution of the original suit upon which judgment in this action is based. It appears that Mrs. Kittredge died October 20, 1926. It is the contention of appellees that the letter is hearsay and therefore not admissible in evidence. Appellant attempts to escape this objection by claiming the benefits, first of Section 1946 of the Code of Civil Procedure. This section provides that the entries of a decedent or other writings of a decedent at or near the time of the transaction are prima facie evidence, in the following cases: (1) When the entry was made against the interest of the person making it; (2) when it was made in performance of a duty specially enjoined by law.

The letter in question, instead of being one against the interest of Mrs. Kittredge, is a self-serving declaration made in her interest for the reason that if the statements in it were true she was not liable for the accident in question. It is very evident she wrote the note to exculpate and free herself of liability under the rule of *respondeat superior*. Therefore, instead of coming under the provisions of subdivision one, it is directly repugnant to the principle of law which otherwise renders admissible such a document. In one breath appellant urges the letter is admissible because it is a duty enjoined by a con-

tract, and one enjoined by law. It is not a duty enjoined by law such as is contemplated by subdivision three. That section has reference to a declaration which the law requires an individual to make such as a tax report, a report of birth, or anything which therefore borders on the official.

Section 331, Vol. 10 *California Jurisprudence,* page 111:

> "*Self-serving Declarations.* Declarations of a person, since deceased, not against, but in support of his own interests, and made outside the presence of the party sought to be bound by them, are not admissible in favor of those who claim rights which the declarations would maintain. They have no greater force as evidence in an action brought subsequent to the death of the declarant then they would have in an action brought by him in his lifetime. Self-serving declarations, made long subsequent to the execution of a contract sought to be enforced, are not admissible as being part of the res gestae."

It is next contended by appellant that the letter is admissible because of the provisions of sections 1870, 1850 and 1853 of the Code of Civil Procedure. We submit that has no application to the letter in question.

Potter v. Smith et al., 48 Cal. App. 162;
Eddy v. Cal. Amusement Co., 21 Cal. App. 487;
Jones v. Duchow, 87 Cal. 109;
Waldeck & Co. v. Pacific Coast S. S. Co., 2 Cal. App. 167.

Section 1853 of the Code of Civil Procedure relates to a declaration against interest, and we repeat the

declaration in question is a self-serving, hearsay declaration having for its purpose the exculpation of Mrs. Kittredge from legal liability, and not one against her interests but very strongly in support thereof.

It is not true that if Mrs. Kittredge was alive her testimony would have been a complete answer for the reason that it would have been the duty of the jury to determine, even if Mrs. Kittredge testified under oath in accordance with the statement in her letter, whether they would believe the witness Mrs. Kittredge or the witness Hooper, and the fact that the defendant did not produce the nurse to contradict Hooper is to be strongly considered in his favor and invokes the suggestion that had it been favorable to defendant the nurse would have been a witness in person or by deposition.

In view of the state of the record, we respectfully submit that the appellant company:

(a) Had full and immediate notice of the accident;

(b) Had full cooperation from all parties concerned;

(c) Promptly received the summons and complaint;

(d) Were immediately advised of the service of the summons on Hooper;

(e) Time and again stated to the witness Crawford that it would not appear or defend the case, assuming they had any defense;

(f) Failed to prove that the summons and complaint was not forwarded to the company at Philadelphia, and contented themselves with very limited and guarded denials of its witnesses Cresswell and Forsyth that so far as they were concerned, it was not delivered to them personally, and the witness Cresswell failed to deny that he had the conversation with Crawford narrated by the witness Crawford and contented himself with the statement that he did not recall such conversation.

Wherefore, appellees respectfully submit that judgment should be affirmed.

Dated, San Francisco,
October 15, 1930.

JOSEPH A. BROWN,
A. L. CRAWFORD,
Attorneys for Appellees.

No. 6165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (a corporation),

Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST (a minor), by Belva Forrest, his guardian ad litem,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

HARTLEY F. PEART,
GUS L. BARATY,
Hunter-Dulin Building, San Francisco,
Attorneys for Appellant and Petitioner.

No. 6165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST (a minor), by Belva Forrest, his guardian ad litem,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, and to the Honorable Frank H. Rudkin, Judges of the United States Circuit Court of Appeals, for the Ninth Circuit, and to the Honorable Frank H. Norcross, Judge of the District Court of the United States, Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In this action the appellees sought to recover on a policy commonly known as an automobile liability policy. The named assured under this policy, Mrs. Kittredge, died and the present action concerns a judgment obtained against Hooper, a chauffeur, and an additional assured under the policy. It is the contention of the appellant that Hooper, as required

by the terms of the policy, failed to forward to the appellant forthwith after receipt thereof a copy of the summons and complaint served upon him in the action pending in the state court, and that he also failed to render to the appellant all cooperation and assistance in his power in the defense thereof.

The opinion of this court clearly sets forth the date of the various acts taken in the litigation against Mrs. Kittredge, the named assured, and Hooper, the chauffeur. As is pointed out by the opinion, before Hooper, the chauffeur, was served with process in the state court, Mrs. Kittredge had died, and the action had been ordered abated as to her by judgment. At that moment, February 11, 1927, this appellant was no longer concerned or involved with the facts of that action.

Thereafter and on March 28, 1927, for the first time, Hooper, the chauffeur, was served with a copy of a summons and complaint in an action pending in the state court. It is admitted throughout this litigation that Hooper failed to forward to the appellant a copy of the summons and complaint so served upon him. To become entitled to the benefit of this policy it was then incumbent, we contend, upon Hooper as an additional assured, for the first time to comply with the provisions of the policy, namely, "to forward to the company forthwith after receipt thereof every process, pleading or other paper of any kind relating to any and all claims, suits or proceedings. The assured shall at all times render to the company all cooperation and assistance in his power, * * * " It is specially pleaded in the

amended answer of this appellant that Hooper failed to comply with these provisions of the policy and therefore forfeited whatever rights he might have thereunder.

The opinion states, "There was testimony tending to prove that the process and pleadings served on the co-defendant Kittredge during her lifetime were properly forwarded to the appellant, and this was a sufficient compliance with the requirements of the policy in that regard."

Mrs. Kittredge and her executor did comply with the terms of the policy, but that transaction was completely terminated before Hooper was ever served with process in the state action.

The opinion then proceeds, "While the receipt of the process and pleadings served on the co-defendant gave no notice that service had also been made upon Hooper, there was testimony tending to prove that the appellant had actual notice of the service of process on Hooper both before and after default was entered against him and was given full opportunity to defend in his behalf but refused to do so on the ground that it had a complete defense to the action."

Nowhere in the testimony in this case does it appear that the appellant ever received notice that the summons served upon Hooper was the same summons which it had received some months before on behalf of the named insured, Mrs. Kittredge, and under which proceedings had been terminated by a judgment in favor of the assured Mrs. Kittredge on a dismissal following her death.

The only testimony concerning notice comes from A. L. Crawford, one of the attorneys for the appellee. At page 83 of the transcript he testifies that three or four days after the service of summons on Hooper, he had a conversation with Gus L. Baraty, one of the attorneys for the appellant. At the time of this conversation with Mr. Baraty that attorney's connection with the case had ceased by reason of the dismissal above mentioned and any conversation had with him, therefore, we respectfully contend, was not a notice to this appellant; furthermore, there is no evidence tending to show that Mr. Baraty was a person to whom notice binding this appellant could be given.

The only other evidence concerning notice is that given by the same witness, (transcript, page 85) in a conversation had with Mr. Cresswell, claims agent of the company, which took place after the default of Hooper had been entered. And the records show that default of Hooper was not entered for a period of nearly a year from the time he was served with summons. We respectfully contend, therefore, that this appellant as required by the terms of its policy, did not forthwith, or at all, receive from Hooper or from anyone else a copy of the pleadings served upon him in the state court; that Hooper, therefore, by his failure to comply with the terms of the policy forfeited his rights thereunder and that the appellees in this case have no greater right under the policy than Hooper had himself. In other words, if this appellant by reason of Hooper's forfeiture was not obligated to pay Hooper anything appellant, in turn,

is not obligated to pay appellee who derives her right solely through Hooper. The question of delivery of process to an insurance company and cooperation on the part of the assured has been passed upon by this court in the three cases cited in the opinion. In the case of

Slavens v. Standard Accident Ins. Co., 27 F. 2nd 859,

it appeared that the summons and complaint during the pendency of the action itself had been served upon the insurance company. In the case at bar when Hooper was served with the process we respectfully contend that a new and distinct situation presented itself which required that the appellant be served with a copy of the process in response to which it is claimed it should have appeared and defended. The cited case and the case at bar are not similar as to the facts of notice of pendency of action.

In the case of

Metropolitan Cas. Ins. Co. of N. Y. v. Colthurst, 36 Fed. 2nd 559,

decided by this court January 13, 1930, the assured, Harris, had failed to deliver to the insurance company a copy of the summons and complaint served upon him. This court, at page 561, said:

> "The important consideration was that appellant (the insurance company) should be advised of the service of process so that it could appear in response thereto, in the assured's name, and make defense. * * *
>
> "In that view, admittedly, the cause of his default in not sooner forwarding the summons and complaint, Harris, in case he had satisfied

> the judgment against him, could not have recovered upon the policy, and the question is whether or not, for like reasons, appellee is subject to the same disability. The contract and the statutes provide for a suit 'under the terms' of the policy or 'subject to its terms and limitations,' and we think, in the most favorable view to the injured party, it was contemplated he would comply with such terms to the extent of his ability."

Neither Hooper nor these appellees nor their attorneys after service of process upon Hooper ever delivered the same to this appellant, as required by the terms of the policy.

In the case of

Royal Indemnity v. Morris, 37 F. 2nd 90,

decided by this court January 20, 1930, the named insured failed to deliver summons, and in fact refused to permit a defense to be made in his behalf. This court, in its opinion, stated:

> "Upon the assumption that Gomez, as we hold, was an 'insured,' it must be conceded under the facts stipulated that he violated a material condition of the policy in declining to permit any defense to be made to the action brought against him by the appellee; and, as we understand, it is not contraverted that as a result of the default, he forfeited his right to claim indemnity under the policy. * * *
>
> "It may be added that the duty of the insured in respect of permitting a defense in his name is not susceptible to precise general definition. He is not to be a mere puppet in the hands of the insurer; he is under no obligation to permit a

sham defense to be set up in his name, nor can he be expected to verify an answer which he does not believe to be true; he cannot evade personal responsibility and hence is not bound to yield to any demand which would entail violation of any law or ethical principles; that he cannot arbitrarily or unreasonably decline to assist in making any fair and legitimate defense. Here it is stipulated that he declined to permit any defense to be made in his name, and it is to be presumed that the defendant in such a case could at least legitimately challenge the amount of the alleged damage and require proof."

In the instant case, in passing it might be said, that the demand against Hooper in the state court as set forth in the complaint was very greatly reduced by the court in rendering its judgment. In the case cited (the *Morris* case) this court definitely holds that the failure of Gomez to cooperate was a violation of the policy.

Similarly, we contend that the failure of Hooper, or anyone else to deliver to the appellant a copy of the summons and complaint served upon him, and his failure after service at any time to cooperate with the appellant in the defense of the state action was a forfeiture of whatever rights he had under the policy. It must be understood that there is no attempt anywhere in this litigation to show any collusion on the part of Hooper and this appellant.

Since the printing of our opening brief in this appeal there has come to our attention a case decided by the United States Circuit Court of Appeals, from

the Fourth District, West Virginia, under date of September 19, 1930, entitled

New Jersey Fidelity etc. Company v. Love.

The case concerns recovery under a policy wherein the assured has failed to deliver copy of summons and complaint to the company.

We quote from a decision:

> "The District Court held, although process in the State court against Mrs. Watt, by the plaintiff, was not forwarded to the insurance company until more than seven months after she had received it, nevertheless, the insurance company had an opportunity to appear and defend the action in the state court and that its failure to do so, made it liable under the terms of the policy to the plaintiff."

In reversing, the Circuit Court of Appeals of the Fourth Circuit, cites with approval the cases of

Metropolitan Cas. Ins. Co. v. Colthurst, supra

and

Royal Indemnity Company v. Morris, supra.

The opinion proceeds:

> *"There is no doubt that the insurance company received prompt notice of the accident and made investigations, and no claim is made that the policy should be avoided under that clause. But the insurance company does claim that the clause requiring the assured to give notice of the accident, is separate and distinct from the clause which requires that the assured shall immediately forward process to the company at its office. The insurance company contends, first, that compliance with this clause is a condition precedent to any*

recovery under the policy, binding both upon the assured and upon Mrs. Love, the plaintiff's decedent, and must be complied with within a reasonable time after the institution of the suit, and if not so complied with, no liability attaches in any event; and secondly, that even if it is not a condition precedent, nevertheless, the insurance company was prejudiced by the failure to forward process promptly, in that it was deprived of its rights to cross-examine the plaintiff's witnesses and would be at a disadvantage in defending the suit in the State court.

*The provisions of the policy are plain and unambiguous. The policy provides that 'failure on the part of the assured to comply with any of said conditions shall forfeit the right to recover hereunder.' One of the conditions is that the assured shall immediately forward to the company at its office every summons or other process served upon her. It is obvious that this provision is of the essence of the contract, in insurance of this kind, and not merely a stipulation as to the form of bringing to the notice of the insurer the fact of loss as in policies of fire and life insurance. By the express terms of the policy, failure to comply with the conditions, forfeits the right to recovery * * * but here there was a delay of more than seven months and we think that such a delay under the circumstances was entirely unreasonable."* (Italics ours.)

In the case at bar no summons served upon Hooper was ever forwarded to appellant, and our contention is the same as set forth in the opinion of the Circuit Court of Appeals of the Fourth Circuit, namely, that the provision requiring delivery of process is of the

essence of a contract of this kind of insurance. On the "insolvency" clause in this type of insurance policy, the Court of the Fourth Circuit says:

> "The insolvency clause itself says in plain terms that the personal representative of the injured party may maintain an action 'under the terms of the policy.' If the injured party can dispense with one of the terms, she can dispense with any of them; but our view is that she must comply with its terms and conditions, and if she does not do so, she forfeits her rights under the policy, the same as the assured * * * the point is that the parties have made their contract in plain and unambiguous language, and that by the provisions of that contract, all of its terms must be complied with before there can be a recovery either by the assured or the injured party.
>
> It is argued, however, that the insurance company in this case, had an opportunity to defend the suit, and was not prejudiced by the failure to forward the process promptly * * * but the question, in our view of the case is immaterial, where, by the terms of the policy, a failure to comply is made an express cause for forfeiture, a showing of prejudice is not necessary. A compliance with the conditions of the contract within a reasonable time is indispensable to fixed liability. The condition is a material and important part of the contract, and should not be deliberately set aside as of no moment."

Similarly with the case at bar, the conditions requiring the deliver of all process served upon the assured forthwith, which of course, means within a reasonable time after service, is a material part of

this contract of insurance, in the very nature of business transactions. It must be so. Hooper admittedly never delivered this summons to the appellant. He admittedly never paid any attention to the defense of the action brought against him as is evidenced by his default therein; he thereby violated two of the material and important portions of the contract of insurance of this appellant. We believe that the appellant, under its contract of insurance, had the right to insist that Hooper, the additional assured, should deliver to it the process served upon him; the appellant likewise, we believe, had the right to insist that Hooper cooperate in the defense of that action. Hooper deliberately failed to do either, and no one ever delivered the summons and complaint served upon Hooper to this appellant, after it had been served upon him. If this appellant is to be held bound by certain alleged notices, it should be at least entitled to be served with a copy of the summons and complaint which it is expected to respond to, but nothing of the kind was done in the instant case. The connection of Mrs. Kittredge and the interest of this appellant in her defense had ceased prior to service of any process upon Hooper. The conditions mentioned in this policy, we respectfully contend, are reasonable provisions to be inserted in policies of the appellant, or any insurance company, and the numerous claims and actions of this character that are constantly being filed throughout the country should not be governed by verbal notice given to an insurance company of the pendency of an action without at least being personally served with the document that it is expected to answer and defend for an assured.

We respectfully contend, in conclusion that in the light of the decisions of this court, and the decision cited from the Fourth Circuit, and in the interest of uniformity in decisions on this type of defense under such insurance contracts, that a rehearing in this case should be granted.

Dated, San Francisco,
December 8, 1930.

Respectfully submitted,
HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for appellant and petitioner in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
December 8, 1930.

HARTLEY F. PEART,
GUS L. BARATY,
Counsel for Appellant and Petitioner.

No. 6166

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. M. DUNGAN and EUNICE DUNGAN, His Wife,

Appellants,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filmer Bros. Co Print, 330 Jackson St., S. F., Cal.

No. 6166

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

O. C. MOORE, 501 Peyton Building, Spokane, Washington,

BRUCE BLAKE, 1224 Old National Bank Building, Spokane, Washington,

Attorneys for Plaintiffs.

WAKEFIELD & WITHERSPOON, 403 Peyton Building, Spokane, Washington,

GRAY & POTTS, Coeur d'Alene, Idaho,

Attorneys for Defendant. [1*]

In the Superior Court of the State of Washington, in and for the County of Spokane.

L.—4493.

No. 83,295.

J. M. DUNGAN and EUNICE DUNGAN, His Wife,

Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

Filed Dec. 3, 1928. Harry M. Lucas, Clerk. W. C. Steinmetz, Deputy.

Plaintiffs complain of defendant and for cause of action allege:

I.

That at all the times herein mentioned plaintiffs were and now are husband and wife.

II.

That at all the times in this complaint mentioned defendant was and now is a corporation, organized and existing under and by virtue of the laws of the State of Maine.

III.

That on or about the 28th day of November, A. D. 1925, plaintiffs and defendant made and executed a contract in writing, a copy of which marked Exhibit "A," is hereto attached and made a part of this complaint.

IV.

That all the White Pine timber designated therefor in said contract was, prior to the 12th day of August, 1928, cut into lumber and delivered to and received and accepted by defendant; and all other terms and conditions of said contract, upon performance of which final payment for lumber manufactured and delivered thereunder is conditioned, have been fully performed by plaintiff. [2]

V.

That the total amount of lumber so cut, manufactured and delivered to defendant under said contract was 6,857,307 feet, of which 4,687,063 feet was delivered to and accepted by defendant during the years 1926 and 1927, and the defendant has fully paid therefor as stipulated in said contract, save and except that of the stipulated purchase price, namely, $32.50 per thousand feet, defendant pursuant to the terms and conditions of said contract, withheld and now withholds, the sum of $1.00 per thousand feet as a guarantee for performance by defendant of the requirements of the laws of the State of Idaho for the burning of brush on the lands of which said timber was cut and removed, namely, the sum of $4,687.06, which amount now remains due, owing and unpaid.

VI.

That on and between the —— day of May, 1928, and the 12th day of August, 1928, plaintiffs delivered to defendant and defendant received and accepted 2,170,244 feet of lumber so manufactured by plaintiffs as aforesaid, for which defendant by the terms of said contract became obligated to plaintiffs in the sum of $70,532.93, no part of which has been paid, save and except the sum of $57,149.28 to plaintiffs and the sum of $2,762.50 to laborers for burning of brush on the lands described in said contract, totalling $59,911.78 and that a balance of $10,621.15 remains due, owing and unpaid.

WHEREFORE plaintiffs pray judgment against defendant for the sum of $15,308.21, with interest

thereon at the legal rate from the 12th day of August, 1928, together with their costs and disbursements herein expended.

O. C. MOORE,
Attorney for Plaintiffs. [3]

J. M. Dungan, being first duly sworn, on oath deposes and says: That he is one of the plaintiffs in the above-entitled action, that he has read the foregoing and attached complaint, knows the contents thereof, and that same is true as he verily believes.

J. M. DUNGAN.

Subscribed and sworn to before me this 20th day of November, 1928.

W. R. SAMPSON,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington. [4]

EXHIBIT "A."

LUMBER CONTRACT.

THIS CONTRACT, Made and entered into in duplicate this Twenty-eighth day of November, A. D. 1925, by and between J. M. DUNGAN and EUNICE E. DUNGAN, his wife, of Spokane County, State of Washington, the parties of the first part, and POTLATCH LUMBER COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Maine and authorized to do business in the State of Idaho, the party of the second part: WITNESSETH, That

WHEREAS, the parties of the first part are the owners in fee simple, free from all incumbrance, and entitled to sell all of the merchantable White Pine timber, logs and lumber situate and being upon the lands and premises in Latah County, State of Idaho, particularly described as follows, to-wit:

> The Northeast Quarter (NE¼), the East Half of the Northwest Quarter (E½NW¼), and the North Half of the Southeast Quarter (N½SE¼) of Section Nineteen (19), in Township Thirty-nine (39) North, Range One (1) East of the Boise Meridian, containing Three Hundred Twenty (320) acres, more or less; and

WHEREAS, the parties of the first part are at this time negotiating for the acquisition of other tracts of timber in Latah County, Idaho, particularly described as follows, to-wit:

> The Southeast Quarter of the Southeast Quarter (SE¼ SE¼), of Section Thirteen (13), and the Northeast Quarter of the Northeast Quarter (NE¼ NE¼) of Section Twenty-four (24), Township Thirty-nine (39) North, Range One (1) West of the Boise Meridian, and Lots Four (4), Five (5) and Six (6) and the Northeast Quarter of the Southwest Quarter (NE¼ SW¼) of Section Nineteen (19), and the East Half of the Southwest Quarter (E½ SW¼) and the West Half of the Southeast Quarter (W½ SE¼) of Section Eighteen (18), and a small body of timber lying south of a divide in the Southeast corner of the

Southeast Quarter of the Southwest Quarter (SE¼ SW¼) and in the Southwest corner of the Southwest Quarter of the Southeast Quarter (SW¼ SE¼) of Section Eighteen (18), all in Town-ship Thirty-Nine (39) North, Range One (1) East of the Boise Meridian, containing Four Hundred Twenty-five (425) acres, more or less; and

WHEREAS, The parties of the first part may, in the near future acquire 160 acres of timber more in Section Twenty-four (24), Township Thirty-nine (39) North, Range One (1) West of the Boise Meridian, Latah County, Idaho, and other White Pine timber and timber land contiguous or adjacent to the aforesaid land, and [5] within the same logging chance or operation; and

WHEREAS, All timber above described constitutes one compact body and one logging chance or operation, and is all tributary to a saw-mill and log pond which the parties of the first part will forthwith erect and build, or cause to be erected and built, on the Northwest Quarter of the Northeast Quarter (NW¼ NE¼) of Section Nineteen (19), Township Thirty-nine (39) North, Range One (1) East of the Boise Meridian, Latah County, Idaho.

NOW, THEREFORE, THIS CONTRACT FURTHER WITNESSETH, That the parties of the first part hereby agree to sell to second party, free from incumbrance, in consideration of the compensation hereinafter specified, and by these presents do hereby agree to cut, manufacture, haul,

deliver to and load upon the trucks of second party, in the mill yard of second party at Elk River, Idaho, at points therein to be designated by it, or its agent, all the White Pine timber standing upon the above described premises. now owned by first parties and which they may acquire during the life of this contract, as aforesaid, which will cut to Grade No. 3 Common or better, rough Idaho White Pine lumber; provided, that Grade No. 3 Common shall not exceed 25% of the total cut and delivery; and provided further, that all logs shall be cut into lumber before they shall have deteriorated by reason of fungus or other disease or atmospheric conditions; and second party hereby agrees to purchase such lumber from first parties for the price and upon the terms herein set forth, and each and all of the terms and conditions of this contract shall apply to and cover all of said lands and the White Pine timber thereon, which may be purchased by first parties during the life of this contract, as fully as to the lands and timber thereon, now owned by first parties and first above particularly described. The total estimated amount of White Pine lumber covered by this contract is Nine Million (9,000,000) feet, board measure, more or less, and in any event all of the merchantable White Pine lumber which will meet the specifications herein required for lumber, and which can be cut and manufactured from all the White Pine Timber upon the [6] aforesaid land.

Second party agrees to pay and the first parties agree to accept for said lumber Thirty-two and 50/-

100 Dollars (32.50) per thousand feet, board measure.

Said purchase price shall be paid for such lumber hereinbefore specified upon delivery and loading on lumber trucks of party of the second part, as aforesaid, and subject to the conditions herein contained, as follows: Second party shall pay Thirty-one and 50/100 Dollars ($31.50) per thousand feet, board measure, for such lumber as shall have been delivered during the preceding calendar month, as herein specified, according to the scale bill rendered by the scaler or grader as herein provided, such payment of Thirty-one and 50/100 Dollars ($31.50) per thousand feet, board measure, to be made monthly on or before the eighth day of the calendar month following delivery; Provided, however, that first parties shall not deliver any lumber as aforesaid during any portions of the months of December, January, February and March of any year, during which the mill of second party at Elk River is not operating. Final payment shall be made subject to the following conditions:

First parties hereby agree to furnish at their own cost and expense all labor, assistance, equipment and supplies required in cutting, manufacturing, hauling and delivering the lumber furnished under this contract, and before the payment of Thirty-one and 50/100 Dollars ($31.50) per thousand is made as herein provided, first parties shall furnish evidence to the satisfaction of second party that all claims for labor, assistance and supplies accrued, contracted for, and/or incurred in carrying out the

terms of this contract have been paid, and that there are no liens for labor, assistance or supplies of record against said lumber or any portion thereof and, before final payment is made, that the time for filing liens against said lumber for labor, assistance and/or supplies has expired.

It is agreed that during the entire term of this contract and of any and all extensions or continuations of such term, whether verbal, written or implied, first parties shall at their own cost and expense in all respects comply with the requirements of Chapter [7] 150 of the Idaho Session Laws of 1925, as well as with all other laws of the State of Idaho relating to the prevention, detection or suppression of forest fires, and hereby agree to save second party harmless from any and all penalties provided by statute for the failure of first parties to so comply with the law, as well as from any and all damages arising from damage to others through the escape of fires from any of the land or property above referred to, to the land of such other, which damage could be legally chargeable to the lumber purchased by second party.

It is further agreed that, for the purpose of guaranteeing full compliance with the requirements of said laws and the payment of said damage, second party shall withhold from any sum or sums due from final payment to first parties under this contract the sum of One Dollar ($1.00) per thousand feet for all White Pine Lumber covered by and cut, manufactured, hauled and delivered under the terms and provisions of this contract, anything

herein to the contrary notwithstanding, and retain the same until first parties shall have produced Certificates of Clearance from the State Forester or Fire Warden of the District certifying that all the requirements of the aforesaid laws of the State of Idaho have been fully complied with and that no fire has escaped from any of the property herein referred to, to the land or timber of another.

It is further agreed that if, through the violation of any of the laws of the State of Idaho above referred to, or otherwise, any expense shall have been incurred on behalf of the State of Idaho, or of any officer or agent thereof, in carrying out any requirements of any of the laws of the State of Idaho, or which, under any law of the State of Idaho, may become in any manner chargeable to second party as purchaser of said lumber, or which may become chargeable to or a lien upon said lumber so cut and delivered by first parties hereunder, then the said sum herein provided to be withheld and retained by second party as a guarantee of such compliance by first parties, with all the requirements of the laws of the State of Idaho and all damage through the escape [8] of fires as aforesaid, or so much thereof as may be necessary, shall be available for and may be used by second party for the purpose of paying such expense so chargeable to second party, or to said lumber, unless first parties shall produce receipts showing the payment of all such claims, or to the satisfaction of second party guarantee their payment. And such sums may be retained by second party until all such expenses,

claims and/or damages have been fully determined by the officers of the State of Idaho, under whose supervision the matter comes, through agreement of the parties, or the determination by order or decree of a court of competent jurisdiction having jurisdiction of the parties and of the subject matter.

All lumber cut, manufactured, hauled and delivered as herein specified, shall be in strict accordance with written specifications and directions of the party of the second part attached hereto and made a part hereof, subject, however, to changes from time to time by second party, it being understood between the parties hereto that approximately Seventy-five per cent of the lumber manufactured hereunder shall be sawed to a full 8/4 thickness,—that is, 2⅛ inches.

First parties further agree to furnish Abstracts of Title brought down to date showing good and sufficient titles in fee simple, free of incumbrances, to all the land and timber herein described, including all lands and timber to be hereafter acquired and which are covered by the terms and conditions of this contract, and their right to sell said lumber to said second party.

First parties further agree to protect the second party from any damage or damages which may accrue in any manner whatsoever through the cutting, manufacturing, hauling, or delivering of said lumber.

First parties further agree to, at their own cost and expense, secure all necessary privileges to cross

the lands between the property above described and the point of delivery specified, and to assume all risk, damages and liability arising from and through their failure to do so. [9]

First parties hereby warrant and agree to forever defend each and every covenant herein contained and more especially that the first parties are the owners of and entitled to sell, free from incumbrance, the aforesaid lumber, and further agree that each and every of the covenants on their part to be performed will be well and truly performed, and that the lumber herein referred to will all be delivered as aforesaid on or before the Thirty-first day of December, A. D. 1928.

All agreements and covenants herein are contingent upon acts of God, strikes, and other causes beyond control of either party hereto.

Second party agrees to furnish a grader or scaler, at its own cost and expense. Said grader or scaler shall inspect and grade all lumber covered by this contract and, in so doing, shall be strictly governed by the specifications and cutting instructions furnished from time to time by second party, and all grading shall be done in full accordance with rules for the grading of Idaho White Pine Lumber, as reported by the Bureau of Grades and adopted by the Western Pine Manufacturers Association. It is further agreed that the scale and accounts rendered by such grader or scaler shall be final and binding upon each of the parties to this contract and that the point at which inspection shall be made shall be the

point of delivery at Elk River, Idaho, unless otherwise agreed upon.

First parties further agree to remove from the lumber yard of the party of the second part, at their own cost and expense, and within a reasonable time, not exceeding seven days from date of rejection by grader, all lumber which is not up to grade or in accordance with the specifications as herein specified and is, therefore, rejected by the second party. Rejection shall be deemed automatically made by second party at time of grading.

The First Parties further agree that they will, at their own cost and expense, in accordance with the laws of the state of Idaho, arrange for and procure Workmen's Compensation and provide a suitable hospital contract for all employees, contractors, [10] subcontractors and piece workers in any manner engaged in carrying out this contract, and at all times during the continuance of this contract will maintain such Workmen's Compensation and hospital contract in good standing.

It is further understood and agreed by and between the parties hereto, that the sum of Five Dollars ($5.00) per thousand board feet represents the loss to second party contemplated by the parties hereto by reason of its failure to receive the amount of lumber short of the full amount which first parties have agreed to cut, manufacture and deliver hereunder, and that if first parties fail, neglect or refuse to cut and manufacture into lumber all of the merchantable White Pine timber upon the lands referred to herein as being now owned by first par-

ties and which may be acquired by first parties during the life of this contract, (except such timber as may have been destroyed by fire) and to deliver the same to second party as herein provided, the first parties shall and do hereby agree to pay to second party the sum of Five Dollars ($5.00) per thousand feet, board measure, for every thousand feet they shall fail, neglect or refuse to so cut, manufacture and deliver to second party, as well as and in addition to the cost of determining the amount of the shortage of lumber which they have failed, neglected or refused to so cut, manufacture and deliver to second party. It is further understood and agreed by and between the parties hereto that second party shall have and is hereby given a prior lien upon all of the real property hereinbefore referred to, and to the timber thereon and/or which may be cut therefrom, as security for the performance by first parties of each and all of the terms and conditions of this contract.

And it is further understood and agreed by and between the parties hereto that if second party shall fail, neglect or refuse to accept from first parties White Pine Lumber cut, manufactured and delivered by them to it in accordance with the terms hereof, and which meets and fulfills the conditions and specifications for lumber provided for herein, second party shall pay to first [11] parties the sum of Five Dollars ($5.00) per thousand board feet for all such lumber so delivered to, but not accepted and paid for by second party. Such payment of Five Dollars ($5.00) per thousand board

feet shall be in addition to the agreed purchase price for lumber which shall have been cut, manufactured and delivered by first parties from the land and timber covered by this contract.

All of the covenants, agreements and conditions of this contract shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the parties of the first part hereunto have set their hands and the said Potlatch Lumber Company has caused this instrument to be executed in its corporate name and its corporate seal to be hereunto affixed the day and year in this instrument first above written.

J. M. DUNGAN,
EUNICE E. DUNGAN,
Parties of the First Part.

Witnesses as to first parties:

A. H. GAWINS, Jr.
POTLATCH LUMBER COMPANY,
By W. D. HUMISTON.
As Its Assistant General Manager,
Party of the Second Part.

Witnesses as to second party:

J. E. GARDNER.
LOIS M. NEWMAN. [12]

State of Washington,
County of Spokane,—ss.

On this 19th day of February, 1926, before me, Milton Nussbaum, a notary public in and for said County and State, personally appeared J. M. Dungan and Eunice E. Dungan, his wife, known to me to be the persons whose names are subscribed to the within and foregoing instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the date last above written.

MILTON NUSSBAUM. [13]

State of Idaho,
County of Latah,—ss.

On this 3d day of February, in the year 1926, before me, J. E. Gardner, a notary public in and for said State, personally appeared W. D. Humiston, known to me to be the assistant general manager of Potlatch Lumber Company, the corporation that executed the within and foregoing instrument, and acknowledged to me that such corporation executed the same and that he subscribed his name to said instrument as the assistant general manager of said corporation and affixed the seal thereof in attestation, and on oath stated that the seal affixed to said instrument is the corporate seal of said corporation and that all of said acts were done under powers granted by the by-laws of said corporation and in pursuance of directions given by the stockholders and board of directors of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and seal the day and year in this certificate first above written.

J. E. GARDNER,

Notary Public in and for the State of Idaho, Residing at Potlatch.

(My commission expires Oct. 5, 1928.) [14]

SPECIFICATIONS ATTACHED TO AND MADE A PART OF CONTRACT BETWEEN J. M. DUNGAN AND POTLATCH LUMBER COMPANY.

DATED NOVEMBER 28th, 1925.

LOGS AND LOGGING.

All logs shall be cut to such lengths as to provide from three (3) to four (4) inches extra length which will permit trimming the ends of the boards produced therefrom at true right angles to the edges of such boards.

All logs of "Select" and/or "Shop" type and quality shall be cut sixteen (16) feet long.

Of the *toal* scale of all logs produced, at least seventy-five per cent (75%) shall be cut sixteen (16) feet long.

No logs shall be cut less than ten (10) feet long, and under no circumstances shall the total scale of all logs produced be represented by more than two (2) per cent of such ten (10) foot logs.

Trees with punk defects shall be so cut that the punk defect will, in so far as possible, come at the

ends of the logs. By so cutting the logs, the punk defects can be trimmed off the boards produced, resulting in higher lumber grades and reduction in waste. If possible, without sacrificing too much timber, the punk defect should be cut off the logs in the woods.

SAWING LUMBER.

All lumber cut and delivered under the within contract shall be so sawed as to be uniform in thickness throughout the entire length and width of each piece and such thicknesses shall be those hereinafter specified. In sawing said lumber, the taper levers on the log carriage shall be used and the logs shall be turned on the carriage, whenever so doing will result in producing lumber of a better grade and/or quality than would otherwise be produced. [15]

Cutting up logs "alive" shall not be permitted under any circumstances. In sawing the lumber covered by this contract, all logs shall be so handled and all operations so conducted as to produce the highest possible grade of each piece of lumber consistent with reasonable utilization and economy of the logs.

LUMBER THICKNESSES.

The following thicknesses shall govern in the sawing of all lumber cut and delivered under the within contract, and such thicknesses shall apply to the green lumber so delivered:

1″ lumber shall be cut 31/32″ thick.
5/4″ lumber shall be cut 1–3/8″ thick.

6/4" lumber shall be cut 1–5/8" thick.
8/4" lumber shall be cut 2–1/8" thick.

PERCENTAGES OF THICKNESSES OF LUMBER.

Of the total scale of all lumber cut and delivered under the within contract, the following percentages of various thicknesses shall govern until and unless other written instructions are given to the contrary by Potlatch Lumber Company through or by its General Manager or Assistant General Manager:
75% 8/4", that is 2–1/8" thick.
15% 5/4", that is 1–3/8" thick.
10% 1", that is 31/32" thick.

TRIMMING LUMBER.

All lumber cut and delivered under the within contract shall be carefully and accurately trimmed in such way as to make the ends form true right angles with the sides. In trimming, all lumber shall be cut one (1) inch longer than the nominal lengths of the pieces. All trimming shall be so done as to produce the highest possible grades consistent with reasonable utilization of the lumber. No lumber less than eight (8) feet long will be accepted by Potlatch Lumber Company.

EDGING LUMBER.

All lumber cut and delivered under the within contract shall be carefully and accurately edged in such a way that the edges [16] shall be truly parallel. *Al* edging shall be so done as to produce the

highest possible grades consistent with reasonable utilization of the lumber. All lumber shall be edged to the following widths, green:

4″ Edged to at least 4″ full.
6″ Edged to at least 6″ full.
8″ Edged to at least 8–1/8″ full.
10″ Edged to at least 10¼″ full.
12″ Edged to at least 12–3/8″ full.
13″ and wider edged to at least ½″ over full nominal widths.

All lumber which is narrower than above shall be scaled as the next narrower width; provided, that all lumber narrower than full 4″ throughout its entire length shall be rejected by Potlatch Lumber Company.

All lumber, except #3 Common, shall be square edged and free from wane on both sides and throughout the entire length of each and every piece.

POTLATCH LUMBER COMPANY.
By W. D. HUMISTON,
Assistant General Manager.

Potlatch, Idaho, November 28th, 1925.

Filed in the U. S. District Court, Eastern Dist. of Washington. Jan. 3, 1929. Eva M. Hardin, Clerk. E. L. Colby, Deputy. [17]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.—4493.

J. M. DUNGAN and EUNICE DUNGAN, His Wife,

Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

ANSWER.

Now comes the Potlatch Lumber Company, a corporation, defendant in the above-entitled action, and for its answer to the complaint of plaintiffs on file herein says:

I.

Admits the allegations contained in Paragraphs I, II and III of the complaint.

II.

Answering Paragraph IV of the complaint, defendant denies each and every allegation, averment, statement, matter and thing therein set forth or contained.

III.

Answering Paragraph V of the complaint, defendant denies each and every allegation, averment,

statement, matter and thing set forth or contained therein, except that defendant admits that a total amount of 6,857,307 feet of lumber was cut, manufactured and delivered to it from the timber designated in said contract.

IV.

Answering Paragraph VI of the complaint, defendant denies each and every allegation, averment, statement, matter and thing set forth or contained therein. [18]

For a further answer and by way of counterclaim, defendant alleges:

I.

That on or about the 28th day of November, A. D. 1925, plaintiffs and defendant entered into a contract in writing, a copy of which is attached to the complaint, marked Exhibit "A," and which is hereby referred to and made a part hereof as fully as though again repeated herein at length.

II.

That said contract was negotiated, made and entered into in the State of Idaho, and only the formal execution thereof by plaintiffs took place outside said state. Said contract was to be performed wholly within the State of Idaho, and it was intended by the parties thereto that the performance thereof should be governed by the laws of said state. In so far as the plaintiffs performed said contract, the same was actually performed in the State of Idaho.

III.

That at the time said contract was entered into and at all times subsequent thereto, it was and now is the law of the State of Idaho that in the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if after acceptance of the goods the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, such breach, the seller shall not be liable therefor.

IV.

That said contract contained the following provisions (among others) to wit:

> "Provided, that Grade No. 3 Common shall not exceed 25% of the total cut and delivery." [19]
>
> "The total estimated amount of White Pine Lumber covered by this contract is Nine Million (9,000,000) feet, board measure, more or less."

V.

That by the terms of said contract the plaintiffs expressly warranted that the total amount of lumber cut and delivered thereunder would not contain more than 25% of Grade No. 3 Common lumber and that at least 75% of the total amount of lumber cut

and delivered under said contract would be of a quality better than grade No. 3 Common lumber.

VI.

That the total amount of lumber delivered to defendant by plaintiffs was 6,857,307 feet board measure; that the amount of grade No. 3 Common lumber delivered was 2,299,971 feet board measure; that the amount of grades better than grade No. 3 Common delivered was 4,557,336 feet board measure; that 25% of the total amount of lumber cut and delivered under the contract and the maximum amount of grade No. 3 Common that plaintiffs were entitled to deliver thereunder was 1,519,112 feet; that plaintiffs, in violation of the express warranty in said contract that grade No. 3 Common shall not exceed 25% of the total cut and delivery, delivered to defendant 780,851 feet board measure of grade No. 3 Common lumber in excess of 25% of the total amount of lumber delivered under said contract.

VII.

That plaintiffs made deliveries of lumber under said contract between August, 1926, and August, 1928, and the last delivery thereunder was made on the 15th day of August, 1928; that the total amount of lumber delivered by plaintiffs to defendant under said contract was 2,142,693 feet board measure less than the total amount of lumber to be delivered thereunder as estimated in said contract, to wit: 9,000,000 feet; that defendant did not know that plaintiffs had breached the express warranty in said contract that [20] grade No. 3 Common shall not

exceed 25% of the total cut and delivery thereunder until after the last delivery of lumber was made, and after it had ascertained upon an investigation that all the timber covered by the contract had been cut. That defendant thereupon immediately and within a reasonable time after learning of such breach, to wit, on September 18, 1928, gave notice to the plaintiffs in writing that they had breached said express warranty by delivering an excess of grade No. 3 Common lumber in violation thereof; that thereafter, to wit, on October 13, 1928, and within a reasonable time after learning of such breach, the defendant again gave notice to the plaintiffs in writing of the breach of the express warranty in said contract that grade No. 3 Common shall not exceed 25% of the total cut and delivery and that it considered the excess of grade No. 3 Common delivered a breach of the contract.

VIII.

That grade No. 3 Common rough Idaho White Pine Lumber is an inferior grade of lumber and of much less value than the lumber specified in said contract; that during the period that deliveries of lumber were made under the contract, to wit, from August, 1926, to August, 1928, inclusive, the market value and actual value of the lumber specified in the contract at the place of delivery was the contract price, to wit: $32.50 per thousand feet board measure; that during said period the market value and actual value of grade No. 3 Common rough Idaho White Pine lumber specified in the contract at the place of delivery was not in excess of $13.38

per thousand feet board measure; that by reason of the breach of said express warranty in the contract and the delivery by plaintiffs to defendant of 780,859 feet board measure of grade No. 3 Common lumber in excess of 25% of the total amount of lumber cut and delivered under said contract, defendant was damaged in the sum of $14,930.02, being the [21] difference between the market value and the actual value of the lumber delivered and the market value and the actual value of the lumber, if it had been delivered in accordance with the terms of the contract.

WHEREFORE, defendant prays that plaintiffs take nothing in this action; that defendant recover from plaintiffs on its counterclaim the sum of $14,930.02; and that it recover its costs and disbursements herein expended.

WAKEFIELD & WITHERSPOON,
Residence and P. O. Address:
Spokane, Washington,
GRAY & POTTS,
Residence and P. O. Address:
Coeur d'Alene, Idaho,
Attorneys for Defendant. [22]

State of Washington,
County of Spokane,—ss.

A. W. Laird, being first duly sworn on oath, deposes and says:

That he is an officer, to wit, treasurer and general manager of the Potlatch Lumber Company, defendant in the above-entitled action; that he makes this

verification for and on behalf of said corporation and is authorized so to do; that he has read the within and foregoing answer and knows the contents thereof; and that he believes it to be true.

A. W. LAIRD.

Subscribed and sworn to before me this 16th day of April, A. D. 1929.

[Notarial Seal] HARRY T. DAVENPORT,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Due service of the within answer by receipt of a true copy thereof is hereby accepted at Spokane, this 16th day of April, 1929.

O. C. MOORE,
Attorney for Plaintiffs.

Filed Apr. 17, 1929. [23]

[Title of Court and Cause.]

ORDER ON DEMURRER TO AND MOTION TO STRIKE FROM AFFIRMATIVE ANSWER.

The above cause having heretofore come regularly on to be heard in open court on plaintiff's demurrer to the further answer and counterclaim set forth and alleged in the answer of the defendant to the complaint herein, the parties thereto appearing and being represented by their respective attorneys and the Court having read said demurrer and motion to strike and heard the arguments of counsel

thereon and being now fully advised in the premises, hereby

CONSIDERS, ORDERS AND ADJUDGES that said demurrer be and is hereby overruled, and that said motion to strike be and is hereby sustained, with respect to Paragraphs 2, 3 and 5 of said affirmative answer and counterclaim, and denied as to Paragraph 4 thereof.

Each of the parties is allowed an exception in so far as the above order is adverse to them respectively.

Done in open court this 29th day of October, A. D. 1929.

J. STANLEY WEBSTER,
Judge.

Form approved.

GRAY & POTTS,
WAKEFIELD & WITHERSPOON,
For Deft.
O. C. MOORE,
For Pltfs.

Filed Oct. 29, 1929. [24]

[Title of Court and Cause.]

REPLY.

Come now the plaintiffs and reply to the further answer and counterclaim set forth and alleged in defendant's answer to the complaint herein, as follows:

I.

Admit Paragraph I of said further answer and counterclaim.

II.

Admit Paragraph IV of said further answer and counterclaim.

III.

Deny Paragraph VI of said further answer and counterclaim and the matters and things set forth and alleged therein, save and except plaintiffs admit the total amount of lumber delivered by plaintiffs to defendant was 6,857,307 feet.

IV.

Deny Paragraph VII of said further answer and counterclaim and the matters and things set forth and alleged therein, save and except they admit that plaintiff made certain deliveries of lumber under said contract between August, 1926, and August, 1928. [25]

V.

Deny Paragraph VIII of said further answer and counterclaim and the matters and things set forth and alleged therein, and deny that defendant was or has been damaged in the sum of $14,930.02, or any other sum or amount whatever.

VI.

Paragraphs II, III and V of said further answer and counterclaim have not been heretofore referred to herein for the reason that same have been stricken by order of this Court.

WHEREFORE, plaintiffs pray that defendant take nothing by its said answer and counterclaim and that plaintiffs have and recover judgment as prayed in their complaint herein.

O. C. MOORE,
Attorney for Plaintiffs.

State of Washington,
County of Spokane,—ss.

J. M. Dungan, being first duly sworn, on oath deposes and says that he is one of the plaintiffs in the above-entitled action, that he has read the foregoing and attached reply, knows the contents thereof, and that same is true as he verily believes.

J. M. DUNGAN.

Subscribed and sworn to before me this 28th day of November, 1929.

[Notarial Seal] O. C. MOORE,
Notary Public, in and for the State of Washington,
Residing at Spokane.

Copy received this 29th day of November, 1929.
WAKEFIELD & WITHERSPOON,
Attorneys for Defts.

Filed Nov. 30, 1929. [26]

[Title of Court and Cause.]

AMENDMENTS TO ANSWER.

1. Amend Paragraph Three on page 1 of the answer by changing the period after the word "con-

tract" at the end of said paragraph, and in the fifth line thereof, to a comma and inserting the following:

> "And that 4,687,063 feet of said lumber was delivered to defendant during the years 1926 and 1927 and the defendant has fully paid therefor as stipulated in said contract, save and except that of the stipulated purchase price, namely, $32.50 per thousand feet, defendant, pursuant to the terms and conditions of said contract, withheld the sum of $1.00 per thousand feet as a guaranty for performance by plaintiffs of the requirements of the laws of the state of Idaho for the burning of brush on the lands from which said timber was cut and removed."

2. Amend Paragraph Four on page 1 of the answer, by changing the period after the word "therein" at the end of said paragraph, and in the third line thereof, to a comma and inserting the following:

> "Except that defendant admits that it has paid the sum of $57,149.28 to plaintiffs and the sum of $2,762.50 to laborers for burning of brush on the lands described in said contract, totaling $59,911.78 for lumber delivered by plaintiffs to defendant between the dates therein mentioned."

Copy of the within and foregoing amendments to answer received this 12th day of March, 1930.

O. C. MOORE,
Attorney for Plaintiffs.

Filed March 17, 1930. [27]

[Title of Court and Cause.]

STIPULATION WAIVING JURY.

IT IS HEREBY STIPULATED between the parties to the above-entitled cause, by and through their respective attorneys, that said cause may be tried and determined by the Court without the intervention of a jury, and it is further hereby stipulated that a jury trial of said cause be and hereby is expressly waived.

Dated this 17th day of March, A. D. 1930.

O. C. MOORE and
BRUCE BLAKE,
Attorneys for Plaintiffs.
WAKEFIELD & WITHERSPOON and
GRAY & POTTS,
Attorneys for Defendant.

Filed March 17, 1930. [28]

[Title of Court and Cause.]

PLAINTIFF'S REQUEST FOR FINDINGS OF FACT.

Come now the plaintiffs and hereby request the Court to make and enter the findings of fact No. I and II proposed by and on its behalf, and filed herewith.

O. C. MOORE and
BRUCE BLAKE,
Attorneys for Plaintiff.

Filed Mar. 18, 1930. [29]

[Title of Court and Cause.]

FINDINGS PROPOSED BY PLAINTIFF.

The above-entitled cause having come on regularly for trial to the Court, without a jury, on the 17th day of March, A. D. 1930, Messrs. O. C. Moore and Bruce Blake appearing for plaintiffs and Messrs. Wakefield & Witherspoon and Gray & Potts appearing for defendant, and evidence having been introduced on behalf of the respective parties, and the Court having heard and considered the arguments of counsel thereon and being now fully advised in the premises, hereby finds:

I.

That with respect to all lumber received and

accepted by defendant, it waived any objection as to the grade thereof and is estopped from contending that any portion thereof in excess of the provisions of the contract was No. 3 Common lumber.

II.

That by virtue of said waiver defendant is precluded from recovering any amount on its counterclaim or offsetting any portion or part thereof against the demands of plaintiffs.

Refused.—J. STANLEY WEBSTER, Judge.

Done in open court this —— day of March, A. D. 1930.

_____,
Judge.

Plaintiff excepts in open court to the refusal of the Court to make the above findings numbered I and II, proposed by the plaintiffs, and said exceptions are allowed.

Done in open court this 18th day of March, A. D. 1930.

J. STANLEY WEBSTER,
Judge.

Filed Mar. 18, 1930. [30]

[Title of Court and Cause.]

SPECIAL FINDINGS OF FACT.

This cause came on regularly for trial before the Court sitting without a jury on the 17th day of

March, A. D. 1930, a trial by jury having been expressly waived by the parties in open court and by stipulation in writing filed in the cause, the plaintiffs appearing in person and being represented by their attorneys, Messrs. O. C. Moore and Bruce Blake, and the defendant being represented by its attorneys, Messrs. Wakefield and Witherspoon and Gray & Potts, and evidence, oral and documentary, having been adduced, and the Court having heard the argument of counsel, and being now fully advised in the premises, hereby makes the following

SPECIAL FINDINGS OF FACT

to wit:

I.

That the total amount of lumber delivered by plaintiffs to defendant under the contract alleged in the complaint and admitted by the answer was 6,857,307 feet board measure, Grade No. 3 common or better Rough Idaho White Pine Lumber.

II.

That, of the total amount of lumber so delivered by plaintiffs to defendant, 4,557,336 feet board measure was grade No. 3 Common Rough Idaho White Pine Lumber. [31]

III.

That, of the total amount of lumber so delivered by plaintiffs to defendant, 4,557,336 feet board measure was of grades better than grade No. 3 Common Lumber.

IV.

That twenty-five per cent of the total amount of

lumber cut and delivered by plaintiffs to defendant was 1,519,112 feet board measure.

V.

That plaintiffs delivered to defendant, and defendant received, 780,851 feet board measure of grade No. 3 Common Rough Idaho White Pine Lumber in excess of twenty-five per cent of the total amount of lumber cut and delivered.

VI.

That the excess of 780,851 feet of grade No. 3 Common Lumber was delivered as follows:

In the year 1926, 149,293 feet;
In the year 1927, 321,723 feet;
In the year 1928, 309,843 feet.

VII.

That the market value of the excess of grade No. 3 Common Lumber at the place of delivery was as follows:

In the year 1926 the sum of $15.50 per thousand feet board measure;
In the year 1927 the sum of $14.50 per thousand feet board measure;
In the year 1928 the sum of $13.50 per thousand feet board measure.

VIII.

That the difference between the market value of the excess of grade No. 3 Common Lumber delivered and the contract price is the sum of Fourteen

Thousand Two Hundred Sixteen and 02/100 ($14,216.02) Dollars.

IX.

That the defendant is entitled to set off against the [32] demand of the plaintiffs the said sum of Fourteen Thousand Two Hundred Sixteen and 02/100 ($14,216.02) Dollars under its counterclaim.

Done in open court this 18th day of March, A. D. 1930.

J. STANLEY WEBSTER,
Judge.

To each and every of the foregoing special findings from two to nine, inclusive, the plaintiffs entered their exceptions and said exceptions allowed this 18th day of March, 1930.

J. STANLEY WEBSTER,
Judge.

Filed March 18, 1930. [33]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.—4493.

J. M. DUNGAN and EUNICE DUNGAN, His Wife,

Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause came on regularly for trial before the Court sitting without a jury on the 17th day of March, A. D. 1930, a trial by jury having been expressly waived by the parties in open court and by a stipulation in writing filed in the cause, the plaintiffs appearing in person and being represented by their attorneys, Messrs. O. C. Moore and Bruce Blake, and the defendant being represented by its attorneys, Messrs. Wakefield & Witherspoon and Gray & Potts, and evidence, oral and documentary, having been adduced, and the Court having heard the argument of counsel, and the cause having been submitted for decision, and the Court having made and filed herein special findings of fact, and being now fully advised in the premises, hereby CONSIDERS, ORDERS AND ADJUDGES:

1. That plaintiffs are entitled to recover from the defendant on the cause of action stated in their complaint the sum of Fifteen Thousand Three Hundred Eight and 21/100 ($15,308.21) Dollars.

2. That defendant is entitled to recover from the plaintiffs on its counterclaim the sum of Fourteen Thousand Two Hundred Sixteen and 02/100 ($14,216.02) Dollars, and that defendant is entitled to have said amount set off against the demand of plaintiffs.

3. That plaintiffs are entitled to recover judgment against the defendant for the sum of One Thousand Ninety-two and [34] 19/100 ($1,092.19) Dollars, with interest thereon at the rate of Six

(6%) per cent per annum from the 12th day of August, 1928, amounting to One Hundred Four and 66/100 ($104.66) Dollars, aggregating the sum of One Thousand One Hundred Ninety-six and 85/100 ($1,196.85) Dollars, and their costs and disbursements herein expended, with interest on the judgment at the rate of six (6%) per cent per annum from the date hereof.

WHEREFORE, by reason of the law and the findings aforesaid, IT IS HEREBY ORDERED, ADJUDGED AND DECREED,—

That the plaintiffs, J. M. Dungan and Eunice Dungan, his wife, do have and recover of and from the defendant, Potlatch Lumber Company, a corporation, the sum of One Thousand Ninety-two and 19/100 ($1,092.19) Dollars, with interest thereon at the rate of six (6%) per cent per annum from the 12th day of August, 1928, amounting to One Hundred Four and 66/100 ($104.66) Dollars, aggregating the sum of One Thousand One Hundred Ninety-six and 85/100 ($1,196.85) Dollars, and their costs and disbursements herein expended, taxed at the sum of Ninety-seven and 80/100 Dollars, with interest on the whole amount thereof at the rate of six (6%) per cent per annum from the date hereof.

Done in open court this 18th day of March, A. D. 1930.

J. STANLEY WEBSTER,
Judge.

The plaintiffs entered their exceptions to findings numbers two and three in the foregoing judgment

and said exception allowed this 18th day of March, 1930.

J. STANLEY WEBSTER,
Judge.

Filed March 18, 1930. [35]

[Title of Court and Cause.]

ORDER EXTENDING TERM.

Upon application of plaintiffs,—

IT IS HEREBY ORDERED that the term at which judgment was entered in this action be and the same is hereby extended for a period of 60 days for the purpose of retaining jurisdiction of the above-entitled cause to file, present and settle bill of exceptions, and to file, hear and determine any and all motions that might have been filed, heard or determined during the term in which the judgment herein was entered.

Done in open court this 20th day of March, 1930.

J. STANLEY WEBSTER,
Judge.

Filed Mar. 20, 1930. [36]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on for trial on the 17th day of March, 1930, before the above-entitled court, the plaintiffs appearing in

person and by their attorneys, O. C. Moore and Bruce Blake, and the defendant appearing by its attorneys, Gray & Potts and Wakefield & Witherspoon, whereupon, by reason of a written stipulation entered into waiving a trial by jury and consenting that the case be tried by the Hon. J. Stanley Webster, Judge of the above-entitled court, without a jury, the cause was tried without a jury and the following proceedings were had:

Upon the calling of the case Mr. Potts moved for leave to amend the answer in two particulars as follows:

First, to amend Paragraph 3 by changing the period after the word "contract" at the end of said paragraph and by inserting the following:

> "And that 4,687,063 feet of said lumber was delivered to defendant during the years 1926 and 1927, and the defendant has fully paid therefor, as stipulated in said contract, save and except that of the stipulated price, namely, $32.50 per thousand feet, defendant pursuant to the terms and conditions of said contract withheld the sum of One Dollar per thousand feet as a guaranty for performance by plaintiffs of the requirements of the laws of the State of Idaho for the burning of brush on the lands from which said timber was cut and removed."

Second, to amend Paragraph 4 by changing the period [37] after the word "therein" at the end of said paragraph to a comma and by inserting the following:

"Except that defendant admits that it has paid the sum of $57,149.28 to plaintiffs and the sum of $2,762.50 to laborers for burning of brush on the lands described in said contract, totalling $59,911.79, for lumber delivered by said plaintiffs to defendant between the dates therein mentioned."

No objection being interposed, the Court allowed the amendments to be filed.

This is an action to recover $15,308.21, balance alleged to be due upon a logging and milling contract against which the defendant by affirmative defense and set-off pleaded that it had suffered damage in the sum of $14,930.02 by reason of the delivery of lumber of #3 grade in excess of 25% of the total amount of lumber delivered under the contract.

BE IT FURTHER REMEMBERED that during the trial of said cause the following testimony was introduced bearing upon the issues raised by the pleadings and submitted to the Court.

The first witness being introduced was CLARENCE C. CHAMBERS.

TESTIMONY OF CLARENCE C. CHAMBERS, FOR PLAINTIFFS.

Direct Examination.

(By Mr. MOORE.)

My name is Clarence C. Chambers. I was in charge of operations for plaintiffs in the performance of the contract with Potlatch Lumber Com-

(Testimony of Clarence C. Chambers.)

pany. I am acquainted with the lands covered by the contract. The lands described in Plaintiffs' Exhibits Nos. 1, 2 and 3 comprise all the lands contemplated and covered by said contract. All the merchantable white pine timber on the lands contemplated and covered by the contract was cut and removed and manufactured into lumber and delivered to defendant.

Cross-examination.

(By Mr. POTTS.)

I was at all times in charge of the operations. I can't [38] say just what time the last lumber was delivered but some time in '28.

Plaintiffs' Exhibits Nos. 1, 2 and 3 were admitted in evidence. They are certificates of the firewarden of the district to the effect that the plaintiffs had complied with Chap. 150, Idaho Session Laws of 1925, by cleaning up and burning brush, etc.

The Clerk is requested to attach each and all of said exhibits hereto and by reference same are hereby made a part hereof.

The plaintiffs having rested, the defendant called E. H. HANSEN as a witness.

TESTIMONY OF E. H. HANSEN, FOR DEFENDANT.

Direct Examination.

(By Mr. POTTS.)

Mr. HANSEN testified that he was a lumber grader for the Potlatch Lumber Company. Dur-

(Testimony of E. H. Hansen.)

ing the progress of his testimony the following colloquy took place between the Court and the respective counsel:

Mr. MOORE.—May I interrupt for a moment. With the idea of abbreviating this trial and facilitating the examination, I have a suggestion to offer. If our objection to this line of testimony and the questions going to the grade of lumber and their contention of excess of No. 3 Common over 25% was accepted and received, if we could have a general objection to all this line of testimony and exception to your Honor's rulings overruling it, if that is permissible—

The COURT.—I have no objection. I have ruled on the point making up the pleadings in the case and am adhering to the ruling in the hearing of the evidence.

Mr. MOORE.—I was hoping, your Honor, to have an opportunity to present it more fully before the case was all. I want to make a record.

* * * * * * * * *

Mr. MOORE.— Just one other interruption, if your Honor please. [39] Subject to the objection which we have made and which we still urge, plaintiff is willing to stipulate and concede, subject to an exception, that defendant has witnesses and will be able to introduce testimony, tending to establish, pursuant to the allegations of their answer, that there was an excess above 25% of No. 3 Common lumber delivered in accordance with the allegations of their answer. We are not conceding that,

but we concede that they have evidence that will tend to prove that and that we have no evidence, the plaintiffs have no evidence at all on the question.

The COURT.—Does that shorten our hearing?

Mr. POTTS.—It will shorten it materially. The very nature of it will require a great degree of proof.

The COURT.—Yes.

Mr. POTTS.—But, I think the fact as alleged in the answer, that there was a certain amount of No. 3 Common would have to be admitted.

The COURT.—In order to furnish a basis for calculations?

Mr. POTTS.—Yes.

Mr. MOORE.—I intended, your Honor, my suggestion should also include that, they will be able to establish by their witnesses, that the witnesses will testify in a manner to establish that, both as to the grades and the amounts, and we have no testimony to combat it.

Mr. POTTS.—The answer alleges that there was delivered 2,299,971 feet of No. 3 Common under the contract; that there was delivered 4,557,336 feet of better grades; that the total amount delivered was 6,857,307 feet, which is admitted, and that the excess of No. 3 Common over and above 25% of the total cut and delivery was 780,851 feet.

Now, if counsel for plaintiffs will admit that that is the fact, it will dispense with all this proof.

Mr. BLAKE.—If your Honor please, we object to this evidence as being incompetent, irrelevant and

immaterial, on the ground that they have accepted all of the lumber and have waived all of their right to make any complaint that there was in excess of 25% of No. 3.

The COURT.—I understand that.

Mr. BLAKE.—With the record made clear upon that objection; [40] that that objection is overruled and exception taken; then we are willing to admit that their witnesses will testify to facts, or testify to the facts as stated by Mr. Potts, and that we have no controverting testimony on those facts.

The COURT.—Well, of course, if they have testimony tending to prove those facts and there is no evidence offered to rebut it, the Court would have to find as a matter of law that those facts are established, and the only question that would remain is the question of law as to whether or not you are entitled under this contract to offset that because of having accepted the lumber.

Mr. BLAKE.—All we are trying to do is to save our point.

The COURT.—I see. Oh, yes.

Mr. BLAKE.—We are not making an admission here that waives our point.

The COURT.—Oh, no, of course not.

Mr. BLAKE.—It will dispense with offering detailed proof of this.

The COURT.—I understand. The record can show that the Court understands that the plaintiffs in making the concession just stated by Judge Blake reserve all of their rights as to competency, rele-

(Testimony of A. W. Laird.)

vancy and materiality of that testimony, and that the concession is made merely for the purpose of expediting the trial and avoiding the necessity on the part of the defendant of offering this detailed proof in support of the allegations involved. That covers it, doesn't it?

Mr. POTTS.—I think so, your Honor.

The COURT.—Now, I assume, if my memory of this case is accurate, that that leaves a question of law, that with those facts established there is nothing to do but to make a calculation.

Mr. POTTS.—No, your Honor. I wish that were the case but I think we are still confronted with the necessity of proving the value of the No. 3 Common. [41]

TESTIMONY OF A. W. LAIRD, FOR DEFENDANT.

Direct Examination.

(By Mr. POTTS.)

My name is A. W. Laird and I reside at Potlatch, Idaho. I am manager of the Potlatch Lumber Company and have been since 1913.

Mr. POTTS.—Q. Mr. Laird, what is the value, the fair reasonable value of No. 3 Common and Rough Idaho White Pine Lumber at the Elk River mill of the Potlatch Lumber Company during the years 1926, '27 and '28?

Mr. MOORE.—Now, your Honor, we object at this point to that question as irrelevant, incompetent,

(Testimony of A. W. Laird.)

and immaterial, not within the issues, and that this question is not at issue and the defendants are not in position to raise it, having accepted this lumber under the contract.

The COURT.—That objection will be overruled.

Mr. MOORE.—Exception.

The COURT.—Exception allowed.

Mr. POTTS.—Do you desire now to make the admission?

The COURT.—Mr. Laird has not testified yet.

A. You mean price for the green lumber*ed* delivered at the mill?

Mr. POTTS.—Yes, as this lumber under the Dungan contract was delivered at Elk River.

The COURT.—Confining yourself, Mr. Laird, to the No. 3 Common.

Mr. POTTS.—Yes, to No. 3 Common.

A. From 13 and one-half to $15, or $15.50. There was a little variation between the three years.

Q. Now, just apply that to the years, please. Take 1926.

A. I would say in 1926 fifteen dollars and a half; in 1927 fourteen dollars and a half; in 1928 thirteen dollars and a half.

The defendant having rested and the Court having granted plaintiffs leave to reopen their case, J. M. DUNGAN was called. [42]

TESTIMONY OF J. M. DUNGAN, FOR PLAINTIFFS.

Direct Examination.

(By Mr. MOORE.)

I am one of the plaintiffs. I am seventy-one years old. I have been a wheat farmer all by life and never had any experience in the lumber business until I entered into this contract. The contract, a copy of which is attached to the complaint, was prepared by the Potlatch Lumber Company and I signed it without any modifications.

Cross-examination.

(By Mr. POTTS.)

Q. Mr. Clarence C. Chambers negotiated this contract of the Potlatch Lumber Company, did he?

A. No.

Mr. MOORE.—That is not the question. Objected to a*n* improper cross-examination.

The COURT.—Overruled. I do not see any place in the case for any testimony at all, but I will overrule objection.

Mr. MOORE.—Exception.

Mr. POTTS.—Q. Mr. Chambers is a lumberman of years of experience, isn't he.

A. I could not say.

Q. You knew he was, you put him in charge of this operation, he handled this operation for you?

A. He did.

Having heard the argument of counsel the Court rendered the following opinion from the bench:

The COURT.—Well, Gentlemen, I find myself in the same frame of mind. I have given thought to this contract, and I cannot see it in the light of plaintiffs' counsel. I could not at the time it was argued on the pleadings; I cannot now. If there is trouble about this contract, all the trial court can do is to express its views concerning it.

This contract contemplated the cutting and delivery of an indefinite amount of timber. It dealt not only with lands which the [43] plaintiffs owned, it contemplated lands which were to be acquired, and consequently the scope of the area to be logged and cut into lumber was indefinite and uncertain. Lumber from the area that subsequently was cut, and which under the contract it was agreed should be delivered to the defendant company, was to be purchased by it on a lump price basis of $32.50 for all grades as good as No. 3 Common.

Now, at the time this lumber was delivered, as long as the lumber measured up to the grade of No. 3 Common, the lumber company had no discretion to reject it. It met the requirement of the contract. It was to be that good, and if it had been that good, there was no right on the part of the company to reject it.

The contract contemplates and expressly provides that the plaintiffs shall deliver to the company all the lumber that it cuts off the lands in question, and it provides a protection against this lump sum price

of $32.50 that there must not be in excess of twenty-five per cent of No. 3 Common.

How you can determine what twenty-five per cent of a volume of lumber is without knowing what that volume of lumber is, is beyond my comprehension. How you can determine that the common under this contract exceeded twenty-five per cent of the whole, without knowing what the whole was, is beyond my knowledge of mathematics. It seems to me that in the very nature of things, and as inhering in the contract itself, it necessarily contemplates that the contract would have to be performed before anybody would know whether or not the amount of common lumber delivered under it, No. 3 delivered under it, was in excess of twenty-five per cent of the whole, and the contract contemplates the delivery by the plaintiff to the defendant of all the lumbers cut upon the lands in question, and the contract does not provide in its terms what is the value of that No. 3 Common which is found to be in excess of twenty-five per cent, and the law applies. It is not writing a new provision into a contract; it is applying the law of the land to the provisions of the contract as written, and where it clearly provides [44] that as a security for the agreement to pay a lump sum price for all grades above No. 3 Common that the No. 3 Common must not exceed twenty-five per cent of the total lumber delivered, and it does, when the contract is computed, exceed that amount, it leaves plaintiffs in a situation where they have delivered to the defendant a quantity of lumber not covered by the contract as to the $32.50

price, but which the lumber company has accepted and received, and according to my notion of the elementary rules of law applicable in such situations, the defendant is compelled to answer for it at the market price of the lumber at the time and place of its delivery.

The legan conclusion, as it appears to me, is fortified by the fact that it comports with the equities and the common honesty of the transaction. The plaintiffs have no right to saddle upon the defendant a quantity of lumber at $32.50 which, according to the market at the time, was not to exceed half that value, in the face of a provision in the contract which expressly provides that the No. 3 Common shall not exceed a quarter of the entire lumber sold and delivered. If the plaintiffs receive *fro* the lumber that they sold and delivered every dollar that they are entitled to for the seventy-five per cent of the lumber sold, at $32.50, and receive the market value of the excess of the No. 3 Common additional, at the time and place it was received by the lumber company, they receive everything that in equity and good conscience they are entitled to, so the equities of the case are in conformity with what I consider to be the law of the case, and the judgment will be accordingly.

If counsel will get together and take these admitted facts and figure the excess of No. 3 Common, the admitted amount, at the prices stipulated 1926, $15.50; 1927, $14,59; and 1928, $13.50; and present a judgment reflecting that calculation, I will sign it.

It seems to me that so far as the question of the

excess of this No. 3 Common is concerned, the contract is silent upon it. The provision with respect to rejecting cannot possibly be applied to [45] it, because as long as it was No. 3 Common, the company had no right to reject it. If they had laid it aside and said, "Here, Dungan, haul it off," why he would have said, "Why, no. How are you going to determine in advance that this is going to exceed twenty-five per cent of my contract? I have got lumber of better grades yet to come in, that will cut down his ratio. This lumber that I am delivering is No. 3 Common. The contract provides that you shall take it. The only provision in the contract is that there must not be more than twenty-five per cent of this amount. You have no right to prejudge what my contract is going to develop. If I come in here later with lumber enough of the higher grades to offset this amount of common, what right have you got now to reject this common lumber?" And what would your answer have been to that?

It seems to me that there could be no rejection of it as long as it measured up to the stipulations of the contract, and that if on fulfillment it was found that there was an excess amount of No. 3 Common, that the contract with respect to that excess amount is silent, and the law takes charge in a situation of that sort, of an aspect of the transaction between the parties not covered by their agreement, and the law is that the defendant having received and accepted it, must pay for it at the fair market value of it at the time and place of its delivery.

I think you will have no trouble with what I have said to make your calculations, will you, Mr. Potts? The figures are all admitted.

Thereupon the following occurred:

Mr. POTTS.—One difficulty will be applying the values of 1926 and '27 to the admitted figures, the admission being that there is a certain amount delivered during those two years, rather than separately.

The COURT.—You mean there is no date before you on which to determine the amount delivered in each year?

Mr. POTTS.—No, there is not. [46]

The COURT.—Do you desire to offer proof so segregating it?

Mr. POTTS.—Yes, your Honor. I think we should ask permission to reopen our case.

The COURT.—In view of this variation in price from $13.50 to $15.00, there ought to be something here to segregate the amounts of the delivery during those several years.

Mr. POTTS.—Yes, there should be, and also upon the price each year.

The COURT.—I see that. I will allow you to show what amount was delivered of the No. 3 Common in excess of twenty-five per cent during the years 1926, 1927 and 1928, applying the market price as I have stated, as given by Mr. Laird.

DEFENDANT'S CASE RESUMED.

TESTIMONY OF W. L. MAXWELL, FOR DEFENDANT.

W. L. MAXWELL, called as a witness by the defendant, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. POTTS.)

Q. State your name, Mr. Maxwell, residence and occupation.

A. W. L. Maxwell, Potlatch, Idaho. Auditor of the Potlatch Lumber Company.

Q. Mr. Maxwell, have you computed from the books of the Potlatch Lumber Company the amount of the No. 3 Common for each of the years 1926, 1927 and 1928? A. I have.

The COURT.—Delivered under the Dungan contract?

The WITNESS.—I have.

Mr. POTTS.—Q. And have you that computation with you?

A. Yes, sir.

Q. Will you state the amount of the No. 3, the excess of No. 3. [47]

A. I would have to make that computation, Mr. Potts.

Q. All right. You have the amount of No. 3 that was delivered each year?

(Testimony of W. L. Maxwell.)

A. I have the amount of No. 2 and better, and the amount of No. 3.

The COURT.—Can you do that if we give you a little time now?

The WITNESS.—Yes, sir.

The COURT.—We will take a few minutes recess and allow Mr. Maxwell to make that computation, and when he has it ready, he can call me. We will take a recess.

(At this time a short recess was taken.)

Mr. POTTS.—Q. Mr. Maxwell, have you computed the proportion of the excess of No. 3 Common delivered in each of the years 1926, '27 and '28?

A. I have.

Q. Give it, please. How much in 1926?

A. 149,293 feet.

Q. In 1927? A. 321,723 feet.

Q. And in 1928? A. 309,843 feet.

The COURT.—Now, we have the full data for the calculation, haven't we?

Mr. POTTS.—I think so. Yes, I think that is all.

Cross-examination.

(By Mr. MOORE.)

Q. Do those totals, may I inquire, total up the full amount as you allege, you have stated?

A. Yes, sir.

The COURT.—Have you proved that?

The WITNESS.—Yes, sir.

(Testimony of W. L. Maxwell.)

The COURT.—And it makes the total amount? [48]

The WITNESS.—It makes the total amount; yes, sir.

On March 18, 1930, the Court entered judgment and made general and special findings to certain of which plaintiffs duly excepted; and the Court refused to make findings proposed by plaintiffs to which refusal plaintiffs duly excepted.

And now the plaintiffs present the foregoing as their bill of exceptions and pray that the same may be settled, allowed, signed and certified as provided by law and the practice of this Honorable Court.

O. C. MOORE,
BRUCE BLAKE,
Attorneys for Plaintiffs.

Due service of the within bill of exceptions, by true copy thereof, is admitted at Spokane, Washington, this 26th day of March, A. D. 1930.

GRAY & POTTS,
WAKEFIELD & WITHERSPOON,
Attorneys for Defendant.

Lodged Mar. 26, 1930.
Filed Apr. 26, 1930. [49]

L.—4493.

PLAINTIFF'S EXHIBIT No. 1.

Adm. E. M. H.

State of Idaho.

CERTIFICATE OF CLEARANCE.

No. 65.

THIS CERTIFIES That I have personally inspected the disposal of slash incident to the logging and cedar operations of J. M. Dungan of Spokane, Washington, on the following described tracts or parcels of Forest Land in Idaho, to-wit, SE¼SE¼, Sec. 13, NE¼NE¼, Sec. 24, T. 39 N. R. 1 W., E½-SW¼, W½SE¼, Sec. 18, N½, N½S½, Sec. 19, T. 39 N. R. 1, E. B. M.

Containing six hundred acres of slash, more or less.

This slash was made in the years of 1926, 1927 and 1928. The land is reputed to be owned by J. M. Dungan of Spokane, Washington.

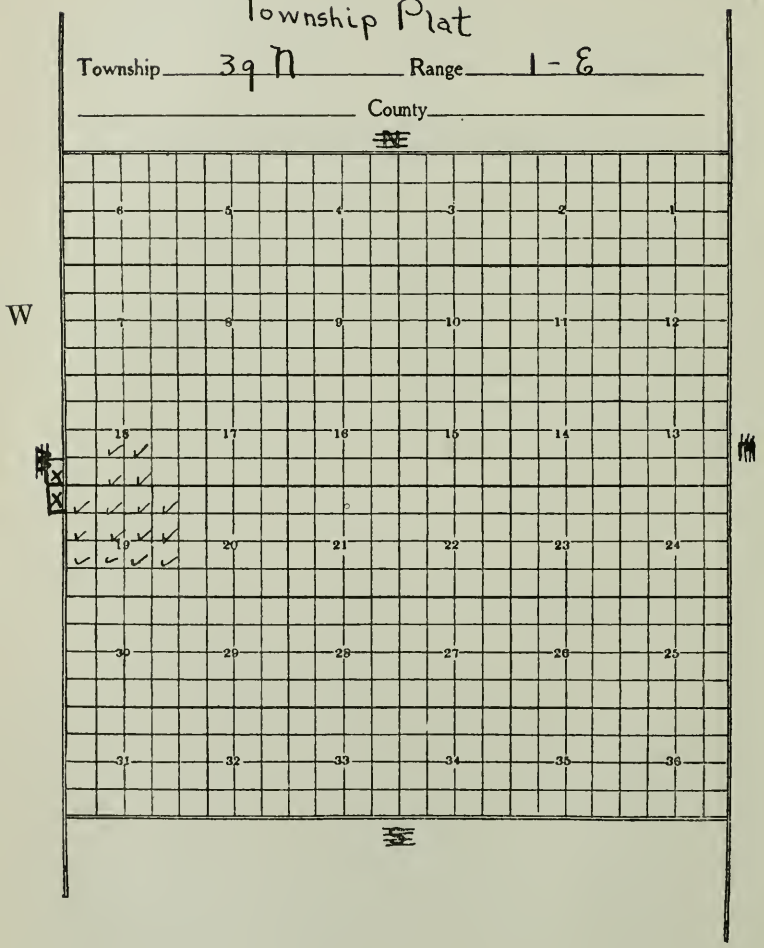
THIS IS TO FURTHER CERTIFY That, as a result of such personal inspection, it is my opinion that the slash has been disposed of in accordance with the laws of the State of Idaho; with the rules and regulations of the State Cooperative Board of Forestry and with the written permit of the State Forester (if any) on —— acres of above slashing area, described as follows:

IN WITNESS WHEREOF, I have hereunto affixed my signature this 17th day of October, 1928.

R. L. WOESNER,
Fire-Warden,
Potlatch Forest Protective District of the State of Idaho.

This CERTIFICATE OF CLEARANCE will be accepted by the State Cooperative Board of Forestry, or any Executive Committee thereof; by the State Forester and his Deputy; and by all Fire Wardens and their Deputies as *prima facie* evidence of the facts stated; Provided, however, that this Certificate of Clearance may be revoked, cancelled or disregarded by the State Cooperative Board of Forestry for any reason sufficient to said Board. [50]

Form E.


Township Plat
Township 39 N
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L.—4493.

PLAINTIFF'S EXHIBIT No. 2.

Adm. E. M. H.

State of Idaho.

CERTIFICATE OF CLEARANCE.

No. 652.

THIS CERTIFIES That I have personally inspected the disposal of slash incident to the logging and cedar operations of J. M. Dungan of Spokane, Washington, on the following described tracts or parcels of Forest Land in Idaho, to-wit, a small area of about 15 acres in the South East corner of SE¼NW¼, and the South West corner of SW¼-NE¼, section 18, T. 39 N. R. 1, E. B. M.

Containing fifteen acres of slash, more or less.

This slash was made in the years of 1927 and 1928. The land is reputed to be owned by the Potlatch Lumber Company of Potlatch, Idaho.

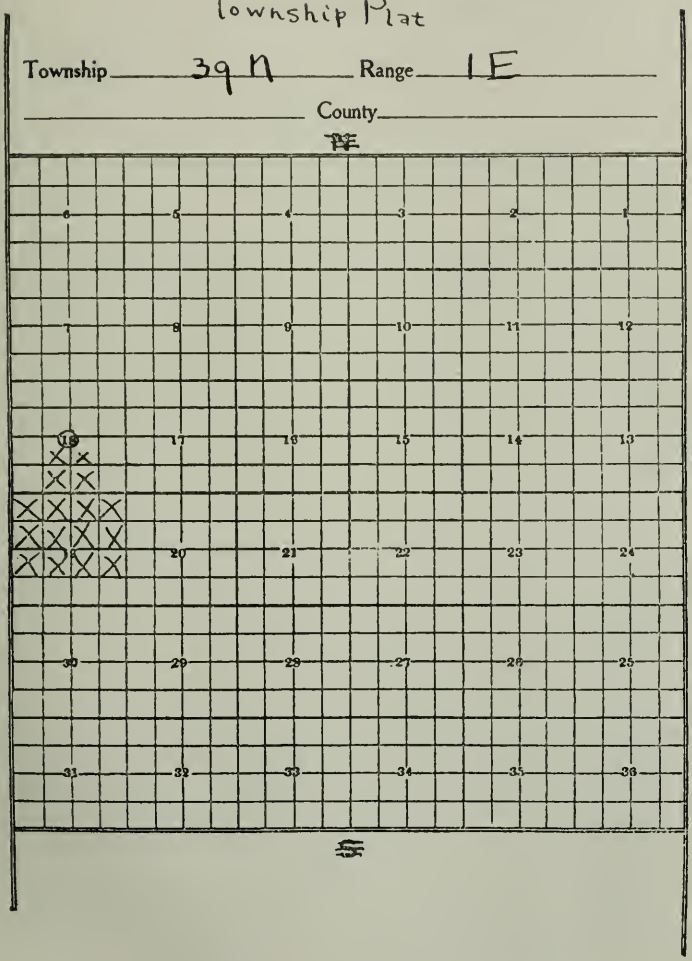
THIS IS TO FURTHER CERTIFY That, as a result of such personal inspection, it is my opinion that the slash has been disposed of in accordance with the laws of the State of Idaho; with the rules and regulations of the State Cooperative Board of Forestry and with the written permit of the State Forester (if any) on —— acres of above slashing area, described as follows:

IN WITNESS WHEREOF, I have hereunto affixed my signature this 7th day of December, 1928.

R. L. WOESNER,
Fire-Warden,
Potlatch Forest Protective District of the State of Idaho.

This CERTIFICATE OF CLEARANCE will be accepted by the State Cooperative Board of Forestry, or any Executive Committee thereof; by the State Forester and his Deputy; and by all Fire Wardens and their Deputies as *prima facie* evidence of the facts stated; Provided, however, that this Certificate of Clearance may be revoked, cancelled or disregarded by the State Cooperative Board of Forestry for any reason sufficient to said Board. [52]

Form E.


Township Plat
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L.—4493.

PLAINTIFF'S EXHIBIT No. 3.

Adm. E. M. H.

State of Idaho.

CERTIFICATE OF CLEARANCE.

No. 653.

THIS CERTIFIES That I have personally inspected the disposal of slash incident to the logging and cedar operations of J. M. Dungan of Spokane, Washington, on the following described tracts or parcels of Forest Land in Idaho, to-wit, SE¼NE¼, NE¼SW¼, N½SE¼, SE¼SE¼, Section 24, T. 39 N. R. 1, W. B. M.

Containing 200 acres of slash, more or less.

This slash was made in the summer of 1928. The land is reputed to be owned by Annie E. Smith Stanley of Los Angeles, California, and A. H. Charles of Santa Rosa, Calif.

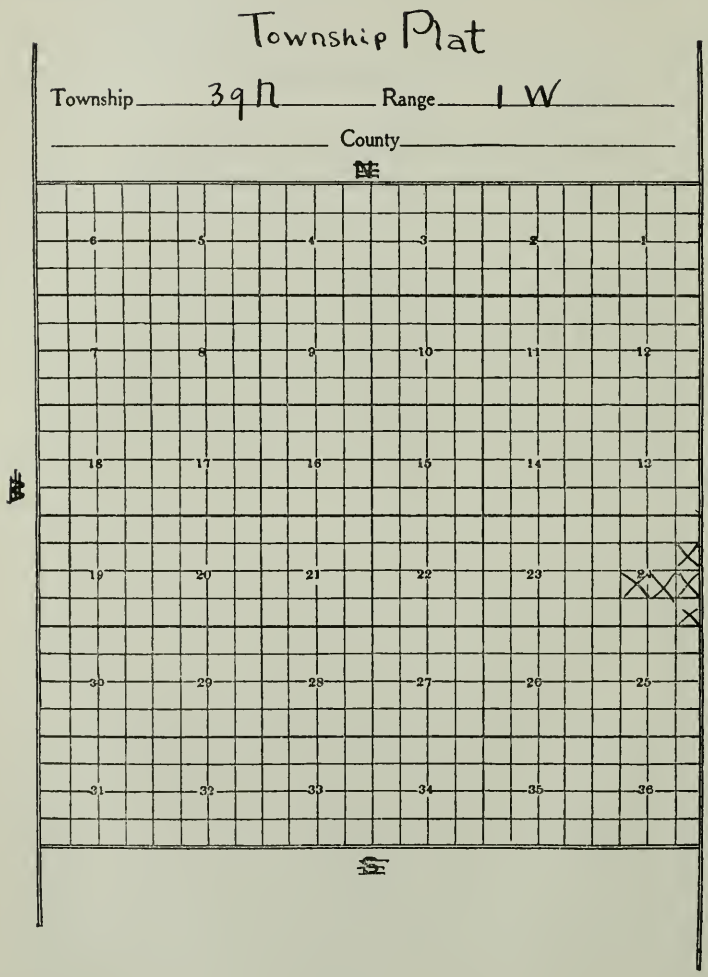
THIS IS TO FURTHER CERTIFY That, as a result of such personal inspection, it is my opinion that the slash has been disposed of in accordance with the laws of the State of Idaho; with the rules and regulations of the State Cooperative Board of Forestry and with the written permit of the State Forester (if any) on —— acres of above slashing area, described as follows:

IN WITNESS WHEREOF, I have hereunto affixed my signature this 7th day of December, 1928.

R. L. WOESNER,
Fire-Warden,
Potlatch Forest Protective District of the State of Idaho.

This CERTIFICATE OF CLEARANCE will be accepted by the State Cooperative Board of Forestry, or any Executive Committee thereof; by the State Forester and his Deputy; and by all Fire Wardens and their Deputies as *prima facie* evidence of the facts stated; Provided, however, that this Certificate of Clearance may be revoked, cancelled or disregarded by the State Cooperative Board of Forestry for any reason sufficient to said Board. [54]

Form E.


Township Plat
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[Title of Court and Cause.]

NOTICE OF FILING OF PLAINTIFF'S BILL OF EXCEPTIONS.

To the Above-named Defendant and to Messrs. Wakefield & Witherspoon and Gray & Potts, Your Attorneys.

YOU AND EACH OF YOU are hereby notified that on the 26th day of March, A. D. 1930, plaintiff filed in the office of the Clerk of the above-entitled court their proposed bill of exceptions in said cause for use upon appeal of said cause to the Circuit Court of Appeals, a copy of which proposed bill of exceptions is herewith served upon you.

O. C. MOORE,
BRUCE BLAKE,
Attorneys for Plaintiff.

Service of the above notice and of the proposed bill of exceptions mentioned therein, by delivery of true copies thereof, is hereby admitted this 26th day of March, A. D. 1930.

GRAY & POTTS,
WAKEFIELD & WITHERSPOON,
Attorneys for Defendant.

Filed Mar. 26, 1930. [56]

[Title of Court and Cause.]

ORDER APPROVING BILL OF EXCEPTIONS.

On this twenty-sixth day of April, 1930, the above cause came on for hearing on notice for the approving and settling of the proposed bill of exceptions, the plaintiffs appearing by one of their attorneys, Bruce Blake, and the defendant appearing by Harry T. Davenport, of the firm of Wakefield & Witherspoon, attorneys for the defendant; and it appearing that the bill of exceptions proposed by plaintiffs and lodged herein on the 26th day of March, 1930, and within the time provided for in the order of this court, and the said proposed bill of exceptions having been presented, filed and certified within the time allowed by said order, and no amendments thereto by the defendant having been offered and suggested, IT IS ORDERED that said proposed bill of exceptions heretofore filed by the plaintiffs in this case be and the same is hereby approved, allowed and settled as the true, full and correct bill of exceptions in this case and that the same as so settled and allowed be here and now certified accordingly by the undersigned, the Judge of this court who presided at the trial of this cause, and that said bill of exceptions when so certified be filed herein by the Clerk of the court, and the said Clerk is hereby directed to attach thereto all exhibits mentioned in said bill of exceptions which said exhibits are hereby made a part thereof. [57]

Done in open court this twenty-sixth day of April, 1930.

J. STANLEY WEBSTER,
Judge.

It is hereby stipulated that the above and foregoing order may be signed without further notice.

Dated April 26, 1930.

O. C. MOORE,
BRUCE BLAKE,
Attorneys for Plaintiffs.
GRAY & POTTS,
WAKEFIELD & WITHERSPOON,
Attorneys for Defendant.

Filed Apr. 26, 1930. [58]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now J. M. Dungan and Eunice Dungan, his wife, plaintiffs in the above cause, and make and file the following assignment of errors on which they will rely on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the review of the final judgment filed and entered herein against them on the 18th day of March, A. D. 1930.

I.

The Court erred in denying plaintiffs' motion to strike Paragraph 4 of defendant's further answer and counterclaim.

II.

The Court erred in overruling plaintiffs' demurrer to the further answer and counterclaim set forth in defendant's answer to the complaint.

III.

The Court erred in overruling plaintiffs' objection to introduction of testimony under defendant's further answer and counterclaim.

IV.

The Court erred in permitting the introduction of testimony concerning and to establish the market value of No. 3 Common Rough Idaho White Pine lumber during the years 1926, 1927 and 1928. [59]

V.

The Court erred in permitting the introduction of testimony with respect to the grades of lumber accepted and received by defendant from plaintiffs under the contract sued upon herein.

VI.

The Court erred in holding and ruling that for No. 3 Rough Idaho White Pine lumber accepted and received by the defendant under its said contract in excess of 25% of the total cut and delivery plaintiff was not entitled to receive and defendant was not obligated to pay in excess of the current market price prevailing in the years in which deliveries were made.

VII.

The Court erred in holding that the evidence in-

troduced by and on behalf of plaintiffs was and is legally insufficient to justify and sustain a judgment in favor of plaintiffs in accordance with the prayer of the complaint.

VIII.

The Court erred in holding that the evidence introduced by and on behalf of defendant was and is legally sufficient to justify and sustain the further answer and counterclaim.

IX.

The Court erred in finding (Special Finding No. 2) that of the total amount of lumber delivered by plaintiffs to defendant 2,299,971 ft. board measure was grade No. 3 Common Rough Idaho White Pine lumber.

X.

The Court erred in finding (Special Finding No. 5) that plaintiffs delivered to defendant and defendant received 780,851 ft. board measure of grade No. 3 Common Rough Idaho White Pine lumber in excess of 25% of the total amount of lumber cut and delivered.

XI.

The Court erred in finding (Special Finding No. 6) that [60] the excess of 780,851 ft. of grade No. 3 Common lumber was delivered as follows:

In the year 1926, 149,293 feet;
In the year 1927, 321,723 feet;
In the year 1928, 309,843 feet.

XII.

The Court erred in finding (Special Finding No. 7) that the market value of the excess of grade No. 3 Common lumber at the place of delivery was as follows:

In the year 1926 the sum of $15.50 per thousand feet Board measure;

In the year 1927 the sum of $14.50 per thousand feet Board measure;

In the year 1928 the sum of $13.50 per thousand feet Board measure.

XIII.

The Court erred in finding (Special Finding No. 8) that the difference between the market value of the excess of grade No. 3 Common lumber delivered, and the contract price, is the sum of Fourteen Thousand Two Hundred Sixteen and 02/100 ($14,-216.02) Dollars.

XIV.

The Court erred in finding (Special Finding No. 9) that the defendant is entitled to set off against the demand of the plaintiffs the said sum of Fourteen Thousand Two Hundred Sixteen and 02/100 ($14,216.02) Dollars under its counterclaim.

XV.

The Court erred in finding, holding and adjudging in the final judgment entered herein that plaintiffs are not entitled to recover from the defendant on the cause of action stated in their complaint the sum of Fifteen Thousand Three Hundred Eight and 21/100 ($15,308.21) Dollars.

XVI.

The Court erred in finding, holding and adjudging in the final judgment entered herein that defendant is entitled to recover from the plaintiffs on its counterclaim the sum of Fourteen Thousand [61] Two Hundred Sixteen and 02/100 ($14,216.02) Dollars, and that defendant is entitled to have said amount set off against the demand of plaintiffs.

XVII.

The Court erred in finding, holding and adjudging in the final judgment entered herein that plaintiffs are only entitled to recover of and from defendant the sum of One Thousand Ninety-two and 19/100 ($1,092.19) Dollars, with interest thereon at the rate of Six (6%) per cent per annum from the 12th day of August, 1928, amounting to One Hundred Four and 66/100 ($104.66) Dollars, aggregating the sum of One Thousand One Hundred Ninety-six and 85/100 ($1,196.85) Dollars, and their costs and disbursements herein expended, with interest on the judgment at the rate of Six (6%) per cent per annum from the date hereof.

XVII.

The Court erred in making and entering the final judgment appealed from herein, in that plaintiffs should have been thereby awarded the sum of $15,308.21 with interest thereon at the legal rate from the 12th day of August, 1928, as prayed in their complaint, without any offset, counterclaim or reduction in favor of defendant.

WHEREFORE the plaintiffs pray that said errors be corrected; that the judgment of the District Court be reversed, set aside and held for naught, and that said District Court be directed to make and enter an amended or supplemental judgment pursuant to the statutes of the United States and the rules of practice and procedure prevailing therein, awarding judgment to plaintiffs in the amount prayed in their complaint.

O. C. MOORE,
BRUCE BLAKE,
Attorneys for Plaintiff.

Service of the foregoing assignment of errors is acknowledged at Spokane, Washington, this 19th day of May, 1930.

GRAY & POTTS,
WAKEFIELD & WITHERSPOON,
Attorneys for Defendant.

Filed May 19, 1930. [62]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

The above-named plaintiffs, J. M. Dungan and Eunice Dungan, his wife, conceiving themselves to be aggrieved by the final judgment made and entered by the Court in the above cause on the 18th day of March, A. D. 1930, whereby they were awarded $1,092.19, together with interest and costs,

said award being the excess of plaintiffs' demand above the amount demanded by defendant's cross-complaint, does hereby appeal from said judgment and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that this appeal be allowed for the reasons specified in the assignment of errors filed herewith, and that a transcript of so much and such portions of the record and proceedings in said cause upon which said final judgment was made as may be necessary and essential to a review of the question by this appeal, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit in order that the errors complained of may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

And your petitioners further pray for the entry of an order fixing the amount of the bond to be furnished by them as a condition to such appeal and for such other and further orders as may be requisite.

O. C. MOORE,
BRUCE BLAKE,
Attorneys for Plaintiffs.

Service of the above petition for allowance of appeal is acknowledged at Spokane, Washington, this 19th day of May, 1930.

GRAY & POTTS,
WAKEFIELD & WITHERSPOON,
Attorneys for Defendants. [63]

Filed May 19, 1930. [64]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On reading and filing the petition of plaintiffs for an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the review and correction of the alleged errors in the proceedings leading up to and involved in the final judgment made and entered in said cause on the 18th day of March, A. D. 1930, and the assignments of error filed by plaintiffs in that connection, it is hereby ordered that an appeal from said judgment be and is hereby allowed as prayed and that a certified transcript of so much and such portions and parts of the record, testimony, exhibits and proceedings herein and upon which said judgment is based as may be essential to a review and determination thereof on such appeal, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and,

IT IS FURTHER ORDERED that the bond on appeal be and is hereby fixed at the sum of $500.00.

Done in open court this 19th day of May, A. D. 1930.

J. STANLEY WEBSTER,
Judge.

Service of the above order allowing appeal is acknowledged at Spokane, Washington, this 19th day of May, 1930.

GRAY & POTTS,
WAKEFIELD and WITHERSPOON,
Attorneys for Defendant.

Filed May 19, 1930. [65]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That J. M. Dungan and Eunice Dungan, his wife, and United States Fidelity & Guaranty Company, a corporation, as surety are held and firmly bound unto Potlatch Lumber Company, a corporation, in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Potlatch Lumber Company, for which payment, well and truly to be made, we bind ourselves and each of our heirs, administrators, executors, successors and assigns, firmly by these presents.

Signed and sealed and dated this 19th day of May, 1930.

WITNESSETH, That whereas lately at the September, 1929, term of the District Court of the United States in and for the Eastern District of Washington, Northern Division, in a suit pending in said court between J. N. Dungan and Eunice Dungan, his wife, were plaintiffs and Potlatch

Lumber Company, a corporation, defendant, a final judgment was entered in favor of the plaintiff in the sum of One Thousand Ninety-Two and 19/100 ($1092.19) Dollars with interest and costs, and whereas the plaintiff has obtained an order allowing an appeal to reverse said judgment in the aforesaid suit and a citation directed to the said Potlatch Lumber Company, a corporation, is about to be issued citing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be [66] holden in the city of San Francisco, thirty days from and after the filing of said citation,—

NOW, THEREFORE, the condition of the above obligation is such that after the said J. M. Dungan and Eunice Dungan, his wife, shall prosecute their appeal to effect and answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

J. M. DUNGAN,
EUNICE DUNGAN,
Principals.

UNITED STATES FIDELITY & GUARANTY COMPANY,
[Corporate Seal] WILLIS E. MAHONEY,
Surety.

Defendant is satisfied with the within bond and the surety thereon.

GRAY & POTTS,
WAKEFIELD & WITHERSPOON,
Attorneys for Defendant.

The foregoing bond is approved as to form, amount and sufficiency of surety, this 19th day of May, 1930.

J. STANLEY WEBSTER,
Judge of the United States District Court for the Eastern District of Washington, Northern Division.

Due service of a copy of the above bond is admitted at Spokane, Washington, this 19th day of May, 1930.

WAKEFIELD & WITHERSPOON,
Attorneys for Defendant. [67]

Filed May 19, 1930. [68]

[Title of Court and Cause.]

CITATION.

The President of the United States to the Potlatch Lumber Company, a Corporation:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein J. M. Dungan and Eunice Dungan, his wife, are the appellants and you are respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not

be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States of America, this 19th day of May, A. D. 1930, and of the Independence of the United States the One Hundred and Fifty-fourth.

J. STANLEY WEBSTER,
United States District Judge.
Attest: EVA M. HARDIN,
Clerk of Court.

Service of the within citation by delivery of copy admitted this 19th day of May, A. D. 1930.

GRAY & POTTS and
WAKEFIELD & WITHERSPOON,
Attorneys for Defendant.

Filed May 19, 1930. [69]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Please prepare and certify to the United States Circuit Court of Appeals, Ninth Circuit, the following records, files and papers in the above-entitled action, for use in connection with plaintiffs' appeal:

1. Complaint.
2. Answer.
3. Order on demurrer to and motion to strike from affirmative answer.
4. Reply.

5. Amendments to answer.
6. Stipulation waiving jury.
7. Plaintiffs' request for findings of fact.
8. Findings proposed by plaintiffs.
9. Special findings of fact.
10. Judgment.
11. Order extending term.
12. Bill of exceptions.
13. All exhibits admitted in evidence.
14. Notice of filing of bill of exceptions.
15. Order settling bill of exceptions.
16. Assignment of errors.
17. Petition for allowance of appeal. [70]
18. Order allowing appeal.
19. Bond on appeal.
20. Citation.
21. Praecipe for transcript of record.

O. C. MOORE.
BRUCE BLAKE.

Filed May 19, 1930. [71]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington,—ss.

I, Eva M. Hardin, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing type-

written pages, numbered 1 to 73, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above-entitled cause as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I do further certify that I hereto attach and herewith transmit the original citation issued in this cause.

I do further certify that the fees of the Clerk of this court for preparing and certifying the foregoing typewritten [72] record amount to the sum of $11.55, and that the same has been paid in full by Messrs. O. C. Moore and Bruce Blake, attorneys for plaintiffs.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 12th day of June, A. D. 1930.

[Seal] EVA M. HARDIN,
Clerk. [73]

[Endorsed]: No. 6166. United States Circuit Court of Appeals for the Ninth Circuit. J. M. Dungan and Eunice Dungan, His Wife, Appellants, vs. Potlatch Lumber Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed June 14, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6166.

J. M. DUNGAN and EUNICE DUNGAN, His Wife,

Appellants,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Appellee.

STIPULATION THAT DEMURRER TO FURTHER ANSWER AND MOTION TO STRIKE PORTIONS OF SAID FURTHER ANSWER, ETC., BE MADE PART OF RECORD.

IT IS HEREBY STIPULATED by the parties to the above cause, acting by their respective counsel, that the demurrer to the further answer and counterclaim of defendant and the motion to strike portions of said further answer and counterclaim may be made a part of the transcript of the record on appeal when copies duly certified by the Clerk of the United States District Court for the Eastern District of Washington, Northern Division, are filed with the Clerk of the above-entitled court.

Dated this 9th day of July, 1930.

O. C. MOORE,
BRUCE BLAKE,
Attorneys for Appellants.
GRAY & POTTS,
WAKEFIELD & WITHERSPOON,
Attorneys for Appellee.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.–4493.

J. M. DUNGAN and EUNICE DUNGAN, His Wife,

Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

DEMURRER TO ANSWER.

Filed May 14, 1929.

Come now the plaintiffs and demur to the further answer and counterclaim set forth and alleged in the answer of the defendant to the complaint in the above-entitled action, for the reason and on the ground that same does not state facts sufficient to constitute a defense or counterclaim to said complaint.

O. C. MOORE,
Attorney for Plaintiffs,
Residence and P. O. Address:
501 Peyton Building,
Spokane, Washington.

Copy received this 23d day of April, 1929.
WAKEFIELD & WITHERSPOON,
Attorneys for Defendant.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.–4493.

J. M. DUNGAN and EUNICE DUNGAN, His Wife,

Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

MOTION TO STRIKE.

Filed May 14, 1929.

Come now the plaintiffs and move the Court for an order striking from the further answer and counterclaim of defendant in the above-entitled action as follows:

I.

Striking Paragraph II for the reason and on the ground that the matters and things alleged in said paragraph are irrelevant, immaterial and evidentiary, and for the further reason that this court is governed exclusively in matters of the character involved by general principles and rules of law as enunciated by the Supreme Court of the United States and other appellate federal courts.

II.

Striking Paragraph III for the reason and on the ground that the matters and things alleged in said paragraph are irrelevant, immaterial and evidentiary, and for the further reason that this court is governed exclusively in matters of the character involved by general principles and rules of law as enunciated by the Supreme Court of the United States and other appellate federal courts, and for the further reason that this court will, in so far as relevant and material, take judicial notice of the laws of Idaho.

III.

Striking Paragraph IV for the reason and on

the ground that the matters and things set forth and alleged therein are irrelevant, immaterial and repetitious.

IV.

Striking Paragraph V for the reason and on the ground that same does not allege any fact but mere conclusions of the pleader and is irrelevant and immaterial.

O. C. MOORE,
Attorney for Plaintiffs.
Residence and P. O. Address:
501 Peyton Building,
Spokane, Washington.

Copy received this 23d day of April, 1929.
WAKEFIELD & WITHERSPOON,
Attorneys for Defendant.

United States of America,
Eastern District of Washington,—ss.

I, Eva M. Hardin, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that I have compared the foregoing copy with the original demurrer to answer and motion to strike, in Cause No. L.–4493, J. M. Dungan and Eunice Dungan, his wife, plaintiffs, vs. Potlatch Lumber Company, a corporation, defendant, in the foregoing entitled cause, now on file and of record in my office at Spokane and that the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and the seal of said court this 9th day of July, 1930.

[Seal] EVA M. HARDIN,
Clerk.

By ——————————,
Deputy.

[Endorsed]: Filed Jul. 11, 1930. Paul P. O'Brien, Clerk.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. M. DUNGAN and EUNICE DUNGAN, His Wife,
Appellants,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Appellee.

No. 6166.

APPELLANTS' BRIEF

On Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

O. C. MOORE
and
BRUCE BLAKE,
Office and P. O. Address,
Spokane, Washington,
Attorneys for Appellants.

THE FRANKLIN PRESS, SPOKANE

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. M. DUNGAN and EUNICE DUNGAN, His Wife,
Appellants,
vs.
POTLATCH LUMBER COMPANY, a Corporation,
Appellee.
No. 6166.

APPELLANTS' BRIEF

On Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

O. C. MOORE
and
BRUCE BLAKE,
Office and P. O. Address,
Spokane, Washington,
Attorneys for Appellants.

SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES (*Continued*)

STATEMENT

This action was brought by appellants to recover from appellee a balance of $15,308.21, with interest from August 12, 1928, due on a lumber contract, a copy of which is attached to the complaint (Rec. p. 4).

By the terms of the contract appellants agreed to cut, saw into lumber and deliver to appellee, at Elk River, Idaho, all the merchantable White Pine timber upon certain described lands

> "* * * which will cut to Grade No. 3 Common or better, rough Idaho White Pine lumber; provided, that Grade No. 3 Common shall not exceed 25% of the total cut and delivery."

For the lumber to be so cut and delivered,

> "Second party agrees to pay and the first parties agree to accept for said lumber Thirty-two and 50/100 Dollars (32.50) per thousand feet, board measure."

As a guarantee against labor liens, fire loss, etc., $1.00 from each thousand feet purchase price was to be temporarily retained by appellee, and with respect to the balance,

> "Second party shall pay Thirty-one and 50/100 Dollars ($31.50) per thousand feet, board measure, for such lumber as shall have been delivered during the preceding calendar month, as herein specified, according to the scale bill rendered by the scaler or grader as herein provided, such pay-

> ment of Thirty-one and 50/100 Dollars ($31.50) per thousand feet, board measure, to be made monthly on or before the eighth day of the calendar month following delivery."

The contract stipulates for the scaling and grading of the lumber by a scaler or grader furnished by appellee.

> "Said grader or scaler shall inspect and grade all lumber covered by this contract * * * It is further agreed that the scale and accounts rendered by such grader or scaler shall be final and binding upon each of the parties to this contract * * * ."

The contract also provides,

> "First parties (appellants) further agree to remove from the lumber yard of the party of the second part, at their own cost and expense, and within a reasonable time, not exceeding seven days from date of rejection by grader, all lumber which is not up to grade or in accordance with the specifications as herein specified and is, therefore, rejected by the second party. *Rejection shall be deemed automatically made by second party at time of grading.*" (Italics ours.)

An affirmative answer and counterclaim was interposed (Rec. p. 22) to which a demurrer on the ground of insufficiency of facts was overruled (Rec. p. 27), while by the same order a motion to strike was granted as to paragraphs 2, 3, and 5, and denied as to paragraph 4.

The remaining paragraphs of the affirmative answer and counterclaim, to which a reply was interposed (Rec. p. 28), allege: Paragraph 1, the execution of the contract set up in the complaint: Paragraph 4, in *haec verba* the above quoted provision of the contract that No. 3 Common lumber shall not be in excess of 25% of the total cut and delivery, likewise the language of the contract estimating the timber to be cut at 9,000,000 feet: Paragraph 6, that the total cut delivered to defendant was 6,857,307 feet, of which 2,299,971 feet was No. 3 Common and 4,557,336 feet was better than No. 3 Common, and that the excess of No. 3 Common delivered was 780,851 feet: Paragraph 7, that the deliveries of lumber were between August, 1926, and the 15th day of August, 1928; that the total deliveries were 2,142,693 feet less than the estimated amount; that plaintiffs did not know until after the last delivery of the alleged excess of No. 3 Common lumber, and that thereafter, on September 18, 1928, written notice was given to appellants of the alleged excess of No. 3 Common above the 25% provided in the contract, also that a second notice was given to appellants on October 13, 1928: Paragraph 8, that No. 3 Common White Pine lumber is an inferior grade, of less value than that specified in the contract; that the market value thereof during the period of

said contract at place of delivery was not in excess of $13.50 per thousand feet, and that by reason of such excess of No. 3 Common defendant was damaged in the sum of $14,930.02.

Pursuant to a stipulation in writing trial was had to the court without a jury (Rec. p. 32).

It is undisputed, and the court found (Spec. Find. I, Rec. p. 35), that 6,857,307 feet of lumber was delivered, nor is it disputed that this constituted all the merchantable White Pine on the land. There were no rejections. Of the above total, it is admitted that 4,687,063 feet was delivered during the years 1926 and 1927 (Rec. p. 31), and that for the lumber so delivered appellee had fully paid, save and except that of the stipulated price, $32.50 per thousand feet, appellee, pursuant to the terms of the contract, withheld the sum of $1.00 per thousand feet as a guarantee for performance by appellants of the requirements of the laws of Idaho for the burning of brush on the lands from which the timber was cut and removed.

The delivery of lumber was completed in August, 1928 (Rec. p. 24, 29, 43), and appellants have been paid $59,911.78, leaving a balance due on the contract price of $15,308.21.

Appellee refused to pay this balance, claiming an

offset in the sum of $14,930.02 on account of the alleged delivery of Grade No. 3 Common, in excess of the 25% of the total quantity delivered (Appellee's Ans., Rec. p. 21, 26).

A motion to strike and a demurrer, directed to the affirmative allegations of the answer just noticed, were denied and overruled respectively (Rec. p. 27).

Subject to objection, on behalf of appellants, as incompetent, irrelevant and immaterial for the reason that appellees having received and accepted all of the lumber thereby waived all right to make complaint that there was an excess above 25% of Grade No. 3 Common (Rec. p. 45, 46), it was stipulated at the trial, for the purpose of shortening the record (Rec. p. 44), that witnesses on behalf of appellee would give testimony tending to establish the allegation of the answer that Grade No. 3 Common lumber exceeded 25% of the total cut and delivery, and that appellants had no evidence on the question.

Over like objection testimony, uncontroverted, was introduced on behalf of appellee to the effect that the market value of No. 3 Common White Pine lumber, during the three years of the performance of the contract ranged from $13.50 to $15.50 per thousand feet.

The court made special findings of fact, omitting formal parts, as follows (Rec. p. 35);

I.

"That the total amount of lumber delivered by plaintiffs to defendant under the contract alleged in the complaint and admitted by the answer was 6,857,307 feet board measure, Grade No. 3 common or better Rough Idaho White Pine Lumber.

II.

That, of the total amount of lumber so delivered by plaintiffs to defendant, 4,557,336 feet board measure was grade No. 3 Common Rough Idaho White Pine Lumber (31).

III.

That, of the total amount of lumber so delivered by plaintiffs to defendant, 4,557,336 feet board measure was of grades better than grade No. 3 Common Lumber.

IV.

That twenty-five per cent of the total amount of lumber cut and delivered by plaintiffs to defendant was 1,519,112 feet board measure.

V.

That plaintiffs delivered to defendant, and defendant received, 780,851 feet board measure of grade No. 3 Common Rough Idaho White Pine Lumber in excess of twenty-five per cent of the total amount of lumber cut and delivered.

VI.

That the excess of 780,851 feet of grade No. 3 Common Lumber was delivered as follows:

In the year 1926, 149,293 feet;
In the year 1927, 321,723 feet;
In the year 1928, 309, 843 feet.

VII.

That the market value of the excess of grade No. 3 Common Lumber at the place of delivery was as follows:

In the year 1926 the sum of $15.50 per thousand feet board measure;

In the year 1927 the sum of $14.50 per thousand feet board measure;

In the year 1928 the sum of $13.50 per thousand feet board measure.

VIII.

That the difference between the market value of the excess of grade No. 3 Common lumber delivered and the contract price is the sum of Fourteen Thousand Two Hundred and Sixteen and 02/100 ($14,216.02) Dollars.

IX.

That the defendant is entitled to set off against the (32) demand of the plaintiffs the said sum of Fourteen Thousand Two Hundred Sixteen and 02/100 ($14,216.02) Dollars under its counter-claim."

The following findings are incorporated in the judgment (Rec. p. 38):

"1. That plaintiffs are entitled to recover from

the defendant on the cause of action stated in their complaint the sum of Fifteen Thousand Three Hundred Eight and 21/100 ($15,308.21) Dollars.

2. That defendant is entitled to recover from the plaintiffs on its counterclaim the sum of Fourteen Thousand Two Hundred Sixteen and 02/100 ($14,216.02) Dollars, and that defendant is entitled to have said amount set off against the demand of plaintiffs.

3. That plaintiffs are entitled to recover judgment against the defendant for the sum of One Thousand Ninety-two and (34) 19/100 (1,092.19) Dollars, with interest thereon at the rate of Six (6%) per cent per annum from the 12th day of August, 1928, amounting to One Hundred and Four and 66/100 ($104.66) Dollars, aggregating the sum of One Thousand One Hundred Ninety-six and 85/100 ($1,196.85) Dollars, and their costs and disbursements herein expended, with interest on the judgment at the rate of six (6%) per cent per annum from the date hereof."

Exceptions were duly entered on behalf of appellant (Rec. p. 37) to special findings No. 2 to 9, inclusive, and likewise to general findings No. 2 and 3, incorporated in the judgment (Rec. p. 39).

From the judgment entered, pursuant to the above findings (Rec. p. 38), this appeal is prosecuted (Rec. p. 74).

SPECIFICATIONS OF ERROR

I.

Assignment of error No. 1 (Rec. p. 69) is addressed to the order (Rec. p. 27) denying appellant's motion to strike paragraph 4 of the affirmative answer and counter claim quoting the provision of the contract that grade No. 3 Common lumber shall not exceed 25% of the total cut and delivery, and the further provision estimating the lumber covered by the contract at 9,000,000 feet, board measure, more or less.

II.

Assignment of error No. 2 (Rec. p. 70) is addressed to the order (Rec. p. 27) overruling appellant's demurrer to appellee's affirmative answer and counter claim in the sum of $14,930.02 on account of alleged excess of No. 3 Common lumber above 25% of the total cut.

III.

Assignment of error No. 3 (Rec. p. 70) is addressed to the overruling by the trial court of appellant's objection, as irrelevant and immaterial, to the introduction of any testimony under the affirmative answer and counterclaim (Rec. p. 44, 48).

IV.

Assignment of error No. 4 (Rec. p. 70) is addressed to the overruling of appellant's objection, as incompetent, irrevalent and immaterial and not within the issues, to the testimony of A. W. Laird (Rec. p. 47, 48) as to the reasonable value of No. 3 Common White Pine lumber at Elk River, Idaho, during the years 1926, 1927, and 1928, as follows:

> "A. From 13 and one-half to $15, or $15.50. There was a little variation between the years.
> Q. Now, just apply that to the years, please. Take 1926.
> A. I would say in 1926 fifteen dollars and a half; in 1927 fourteen dollars and a half; in 1928 thirteen dollars and a half."

V.

Assignment of error No. 5 (Rec. p. 70) is addressed to the overruling of appellant's objection (Rec. p. 45, 46), as irrevalent and immaterial, to the introduction of testimony concerning the grades of lumber delivered to and accepted and received by appellee, and particularly to the testimony of appellee's witness, Hansen (Rec. p. 44, 45, 46), to the effect that of the total amount of lumber delivered the excess of No. 3 Common above 25% was 780,851 feet, on the ground that by such acceptance under the contract appellee waived all right to complain of the claimed excess of No. 3 Common lumber above 25% of the total delivery.

VI.

Assignment of error No. 6 (Rec. p. 70) is addressed to the holding and ruling that for No. 3 Common Idaho White Pine lumber accepted and received by appellee under its contract, in excess of 25% of the total cut and delivery, appellant was not entitled to receive and appellee was not obliged to pay in excess of the current market price prevailing in the years in which the deliveries were made.

VII.

Assignment of error No. 7 (Rec. p. 70) is addressed to the holding that the evidence introduced by and on behalf of appellant was legally insufficient to justify or sustain the judgment in their favor in accordance with the prayer of the complaint but that the recovery was subject to appellants' counterclaim.

VIII.

Assignment of error No. 8 (Rec. p. 71) is addressed to the holding that the evidence introduced by and on behalf of appellee was legally sufficient to justify and sustain the further answer and counterclaim.

IX.

Assignment of error No. 9 (Rec. p. 71) is addressed to the entry of special finding No. 2 (Rec. p. 35)

that of the total amount of lumber delivered by appellants to appellee 2,299,971 feet, board measure, was Grade No. 3 Common Rough Idaho White Pine lumber.

X.

Assignment of error No. 10 (Rec. p. 71) is addressed to the entry of special finding No. 5 (Rec. p. 36) that appellants delivered to appellee and appellee received 780,851 feet, board measure, of Grade No. 3 Common Rough Idaho White Pine lumber in excess of 25% of the total amount of lumber cut and delivered.

XI.

Assignment of error No. 11 (Rec. p. 71) is addressed to special finding No. 6 (Rec. p. 36) that the excess of 780,851 feet of Grade No. 3 Common lumber was delivered as follows:

In the year 1926, 149,293 feet;
In the year 1927, 321,723 feet;
In the year 1928, 309,843 feet.

XII.

Assignment of error No. 12 (Rec. p. 72) is addressed to special finding No. 7 (Rec. p. 36) that the market value of the excess of Grade No. 3 Common lumber at the place of delivery was

"In the year 1926 the sum of $15.50 per thousand feet board measure;

In the year 1927 the sum of $14.50 per thousand feet board measure;

In the year 1928 the sum of $13.50 per thousand feet board measure."

XIII.

Assignment of error No. 13 (Rec. p. 72) is addressed to special finding No. 8 (Rec. p. 36) that the difference between the market value of the excess of Grade No. 3 Common lumber delivered and the contract price is the sum of $14,216.02.

XIV.

Assignment of error No. 14 (Rec. p. 72) is addressed to special finding No. 9 (Rec. p. 37) that appellee is entitled to set off against the demand of appellants the said sum of $14,216.02 as a counterclaim.

XV.

Assignment of error No. 15 (Rec. p. 72) is addressed to the finding and holding in the final judgment entered below (Rec. p. 38) that appellants are not entitled to recover from appellee on the cause of action stated in their complaint in the sum of $15,308.21.

XVI.

Assignment of error No. 16 (Rec. p. 73) is addressed to the finding and holding in the final judgment entered below (Rec. p. 38) that appellee is entitled to recover from appellants on its counterclaim the sum of $14,216.02, and that it is entitled to have said amount set off against the demand of appellants.

XVII.

Assignment of error No. 17 (Rec. p. 73) is addressed to the finding and holding in the final judgment entered below (Rec. p. 38) that appellants are only entitled to recover of and from appellee the sum of $1,092.19, with interest thereon at the rate of 6% per annum from the 12th day of August, 1928, amounting to $104.66, aggregating the sum of $1,196.85, and their costs and disbursements herein expended, with interest on the judgment at the rate of 6% per annum from the date of entry.

XVIII.

Assignment of error No. 18 (Rec. p. 73) is addressed to the making and entering of the final judgment from which this appeal is prosecuted (Rec. p. 38) in that appellants should have been thereby awarded the sum of $15,308.21, with interest at the legal rate from the 12th day of August, 1928, as prayed in their complaint, without any offset, counterclaim or reduction in favor of appellee.

ARGUMENT

Questions of law only are at issue and their solution must be found in the construction to be placed on the contract between the parties and the acts of appellee thereunder. It follows that whatever may be said in support of any specification of error applies, with the exception of No. 8, equally to all. It is believed, therefore, that the presentation may be facilitated by considering the several specifications of error as a group, without any attempt at separate discussion.

I.

NO WARRANTY

The contract is executory in form and the sale of lumber was not in *praesenti*, since it stipulates

> "That the parties of the first part hereby *agree to sell* to second party."

certain lumber to be thereafter manufactured, pursuant to specifications and subject to inspection and rejection by appellee at the point of delivery.

Since title did not pass prior to acceptance, following inspection, there was no warranty, either express or implied, as to the grade or quality of the lumber, and the specification as to grade was a mere condition precedent.

> "As said by the federal supreme court (*Pope vs. Allis,* 115 U. S. 363, 9 L. ed. 393), where the subject matter of a sale is not in existence or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities is not a mere warranty, but a condition, the performance of which is precedent to any obligation on the buyer under the contract; because the existence of those qualities, being a part of the description of the thing sold, becomes essential to its identity, and the buyer cannot be obliged to receive and pay for a thing different from that for which he contracted."
> 24 R. C. L. 290, Sec. 572.

Williston on Sales (2 ed.), Sec. 234, thus states the rule,

> "It is rightly held that ordinarily where the buyer has no opportunity to inspect goods, there should be no warranty implied as to defects which the examination ought to disclose, for the basis of implied warranty is justifiable reliance of the buyer upon the seller's judgment."

The Supreme Court of Washington in the well considered case of *Hurley-Mason Co. vs. Stebbins, Walker & Spinning,* 79 Wash. 366, 374, 376, 140 Pac. 381, Ann. Cas. 1916A 948, L. R. A. 1915B, 1131, held,

> "The sale being subject to the tests, if the material delivered did not meet the tests, then there was to be no sale. This is a very different thing from a collateral undertaking that all cement delivered should meet the tests. A sale subject to ininspection should never be construed as a warranty against defects which the inspection con-

templated would disclose. * * * Where an executory sale is made with the provision that the article is subject to inspection, whether written into the contract or implied from the custom of the trade, such a provision is held by what we conceive to be the better considered authorities a condition precedent and not a warranty."

To the same effect, we quote from the Nebraska case of *Patrick vs. Norfolk Lbr. Co.,* 115 N. W. 780, 782,

> "As said by Mr. Justice O'Brien in *Carleton vs. Lombard,* 149 N. Y. 137, 43 N. E. 422, and quoted with approval by Mr. Justice Bartlett in *Waeber vs. Talbot,* 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712, 717, that words of description are not considered as a warranty at all; but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words, being part of the description of the thing sold, become essential to its identity, and the vendee cannot be obligated to receive and pay for a thing different from that for which he contracted. * * * The tendency of the recent decisions in this court is to treat such words as part of the contract of sale descriptive of the article sold and to be delivered in the future and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty.' * * * And, if without notice or complaint to plaintiff they took the course they did of hauling the posts to their yard, and selling part of them to the trade, for a period of some 50 days, they are without standing in court."

To the same effect,

Jones vs. McEwan (Ky.), 16 S. W. 81;

Naeber vs. Talbott (N. Y.), 60 N. E. 288;

Allegrezza vs. Sculcucci (Mich.), 225 N. W. 495;

Lieblein vs. Isbell Bean Co. (Mich.), 172 N. W. 388;

Williams vs. Robb (Mich.), 62 N. W. 352;

Florida Athletic Club vs. Hope Lumber Co., 44 S. W. 10;

Smith vs. New Albany Rail Mill Co. (Ark.), 6 S. W. 225;

Iowa Gas & Elec. Co. vs. Wallins Creek Coal Co. (Ky.), 1 S. W. (2d.) 1056;

Patrick vs. Norfolk Lbr. Co. (Neb.), 115 N. W. 780;

Horn vs. Elgin Warehouse Co. (Ore.), 190 Pac. 151;

Henderson Elev. Co. vs. North Georgia Mill Co. (Ga.), 55 S. E. 50;

Benjamin on Sales, Sec. 690.

Obviously no form of warranty inhered in the transaction. In this connection we again turn to the contract.

"Second party shall pay * * * for such lumber as shall have been delivered during the preceding calendar month, as herein specified, according to the scale bill rendered by the scaler or grader as herein provided, such payments * * * to be made monthly on or before the eighth day of the calendar month following delivery."

"Said grader or scaler shall inspect and grade all lumber covered by this contract. * * * *It is further agreed that the scale and accounts rendered by such grader or scaler shall be final and binding upon each of the parties to this contract.*"

"First parties (appellants) further agree to remove from the lumber yard of the party of the second part, at their own cost and expense, and within a reasonable time, not exceeding seven days from date of rejection by grader, all lumber which is not up to grade or in accordance with the specifications as herein specified and is, therefore, rejected by the second party. *Rejection shall be deemed automatically made by second party at time of grading.*"

In the absence of a warranty as to grade or quality it is too clear for serious argument that, in the circumstances disclosed by the record, appellee has no ground for offset against appellants' demand for payment of the full stipulated purchase price. As said by this court, speaking through Judge Wolverton, in *Lewiston Mill Co. vs. Cardiff*, 266 Fed. 753, 764,

"It must be conceded, however, that where the sale is by sample and there has been an acceptance after inspection of the commodity, or there has been reasonable opportunity for inspection, either before or after delivery, to determine

whether commodity conformed to the sample, the sale is concluded, and the vendee is bound by his contract of purchase; and while it may be said that an implied warranty of kind and quality accompanies the purchase, there must be a time when the controversy comes to an end, and it is unreasonable and unusual for the purchaser to insist that, at any time after acceptance however remote, he has a right to resort to the warranty for recoupment of damages. The principle should not be lost sight of that, where the commodity conforms to the sample, there is complete performance of the contract of sale."

From the 4th Circuit case of *Johnston Mfg. Co. vs. Wilson Thread Co.,* 269 Fed. 555, 557, we quote

"The general rule is that, if before acceptance of goods material variance from the quality contracted for is so obvious that the purchaser has observed it, or by ordinary inspection would have observed it, and nevertheless accepted the goods, he will be held to have waived the variance from the quality he was entitled to demand. *Supply Co. vs. Jones,* 87 S. C. 428, 69 S. E. 881; *Woods vs. Cramer,* 34 S. C. 508, 13 S. E. 660; *Brooke vs. Milling Co.,* 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780; *Thornton vs. Wynn,* 12 Wheat. 183, 6 L. ed. 595; *Miller vs. Tiffany,* 1 Wall. 298, 309, 17 L. ed. 540; *Dewey vs. West Fairmount Gas Coal Co.,* 123 U. S. 329, 8 Sup. Ct. 148, 31 L. ed. 179, 23 R. C. L. 263, 274, and cases cited."

Likewise the following from the 2nd Circuit case of *Cudahy Packing Co. vs. Narzisenfeld,* 3 Fed. (2 ed.) 567, 570,

> "The maxim of *caveat emptor* embodies an ancient rule of the common law. It is based on the principle that the purchaser buys at his own risk unless the seller gives an express warranty or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in a material inducement to the sale. Under it the buyer is put upon his guard and must stand the loss of an imprudent purchase unless the soundness of the thing bought is warranted by the seller. It applies to sales of personalty where the buyer has an opportunity to inspect the goods and the seller is guilty of no fraud.

To quote again from the leading case of *Hurley-Mason Co. vs. Stebbins, Walker & Spinning,* supra.

> "It seems to us a sound rule, deducible from the authorities, that, where an executory sale is made subject to inspection, an acceptance by the buyer, with or without inspection and without notice to the seller of any defects or offer to return, is a waiver of any claim for damages on account of defects which might have been discovered upon inspection by any ordinary tests or by the tests prescribed by the contract, in the absence of an express warranty intended to survive acceptance."

As logically expressed in the leading New York case of *Pierson vs. Crooks,* 22 N. E. 349, 350,

> "If he (the seller) tenders articles of an inferior quality, the purchaser is not bound to accept them. But if he does accept them, he is, in the absence of fraud, deemed to have assented that

they correspond with the description, and is concluded from subsequently questioning it. This imposes upon the vendee the duty of inspection before acceptance, if he desires to save his rights in case the goods are of inferior quality. There is in such case no warranty of quality which survives acceptance, and the vendee cannot reject the goods after acceptance or recover damages for inferior quality. He can do nothing inconsistent with the right of rejection, or do what is only consistent with acceptance and ownership, without precluding himself."

Equally in point is the language in *Florida Athletic Club vs. Hope Lumber Co.,* 44 S. W. 10, 13,

> "The contract for the sale and delivery of the lumber was an executory one. The title to the lumber did not pass until there was a delivery. The contract stipulated that the lumber was to be 'No. 1 mill run, Texas pine, of first-class quality, free from knots or shakes that would impair its strength or durability.' There was no other provision in the contract as to the grade or quality of the lumber. We understand the rule to be that, where there is a sale of personal property to be delivered, and no express warranty that would survive delivery, upon the delivery with an opportunity to examine the same, and an acceptance, the vendee cannot complain as to visible defects therein, but will be held for the contract price."

Also,

Barnard vs. Kellogg, 10 Wall, 383, 19 L. ed. 987;

Dorsey vs. Watkins, 151 Fed. 340;

Job vs. Heidritter Lbr. Co., 255 Fed. 311, 312; 3 A. L. R. 619.

Carleton vs. Jenks, 80 Fed. 937, 940;

McDonald vs. Kansas City Bolt & Nut Co., 149 Fed. 360, 364.

Furthermore, it is expressly provided by statute in Idaho, Idaho Comp. Stat. 1919, Sec. 5687, Par. 3,

> "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.' '

Identical statutes in Massachusetts, New York and Michigan, have been held not to change the common law rule.

Bradt vs. Holloway, 136 N. E. 254;

Rosenbush vs. Larned, 126 N. E. 341;

Bonwit, Teller Co. vs. Kinlen, 165 N. Y. App. D 351, 150 N. Y. S. 966;

Rubin vs. Crowley, Millner & Co., 183 N. W. 51;

Hunt vs. W. F. Hurd Co., 171 N. W. 373;

American Varnish Co. vs. Globe Furn. Co., 165 N. W. 1050.

II.

WARRANTY, IF ANY, WAIVED BY ACCEPTANCE

Even should it be found that the contract of sale included a warranty, most authorities hold that in the absence of fraud no form of warranty will survive, with respect to obvious defects, inspection and acceptance.

Columbus etc. Iron Co. vs. See, 135 N. W. 920;

Marmet Coal Co. vs. Peoples Coal Co., 226 Fed. 646;

Gill vs. Nat'l Gas Light Co., 137 N. W. 690;

Forsythe vs. Russell Co., 146 S. W. 1103;

Bray vs. Southern Iron etc. Co., 113 S. E. 55;

Kenniston vs. Todd, 117 N. W. 674;

Henderson Elev. Co. vs. North Georgia Mill Co. 55 S. E. 50;

Buick Motor Co. vs. Reid Mfg. Co., 113 N. W. 591;

Rosenfield vs. Swenson, 47 N. W. 718;

Stilwell Co. vs. Biloxi Co., 29 So. 513;

Patrick vs. Norfolk Lbr. Co., 115 N. W. 780;

Northfield Nat'l Bank vs. Arndt, 112 N. W. 451;

Hurley-Mason Co. vs. Stebbins, Walker & Spinning, 79 Wash. 366, 140 Pac. 381.

In the light of the above language of the contract, becomes important Sec. 5721 of the 1919 Comp. Stat. of Idaho, providing,

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know such breach, the seller shall not be liable therefor."

Clearly, it seems to us, the provision of the contract for rejection by appellee, and requiring removal by appellants from appellee's lumber yard, of all rejected lumber within seven days from the date of rejection, together with the further provision for payment of the contract price for all lumber delivered, on or before the eighth day of each calendar month following delivery, is an express agreement of the character contemplated by the first sentence of the above quoted statute and of itself, regardless of general rules of law, precludes a counter claim on account of the alleged excess of

No. 3 Common lumber received and accepted by appellee subsequently to inspection. By failing to reject, pursuant to the contract, the lumber now claimed to have been below grade, appellant must, under Sec. 5721 of the Idaho code, be held to have waived all grounds for complaint or legal redress.

This contention is strongly sustained by the Michigan case of

> *Rubin vs. Crowley, Millner & Co.,* 183 N. W. 51,

holding that retention by the purchaser of goods not in conformity with specifications rendered the buyer liable for the full purchase price, notwithstanding the Uniform Sales Act which embraces the above quoted Idaho statute. After referring to the Uniform Sales Act, the court said,

> "The parties by their contract had provided in advance for precisely the situation which arose, and had expressly agreed upon what should be done by each in case of that contingency. If the goods were different from the sample or specification, defendant agreed to return them at shipper's expense, and plaintiff agreed to receive them. This by the agreement, was the measure of their liability. The case upon principle is controlled by *Hunt vs. W. F. Hurd Co.,* 205 Mich. 142, 171 N. W. 373. In that case a contract was entered into for the sale and shipment of lumber of a certain grade, the entire shipment was to be held intact,

and the seller notified within five days. Some of the lumber was not up to grade. Defendant stored it, and in his defense of an action brought to recover the full contract price sought to invoke the provisions of the Uniform Sales Act (section 11875, C. L. 1915, subd. 4). We there said:

> 'The difficulty we encounter in attempting to follow counsels' line of reasoning lies in the fact that we here have a special agreement between the parties. It cannot be doubted that at common law the parties had the right to contract; nor can it be claimed that the Legislature by the Uniform Sales Act has attempted to take away such right. In subdivision 4 of the section of the act relied upon by defendant's counsel it is expressly provided: 'The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.' "

III.

APPELLEE'S CONTENTIONS

The burden of the argument below on behalf of appellee, likewise the opinion of the trial court expressed from the bench (Rec. p. 50), appeared to be based, without regard to other provisions of the contract, exclusively on the proviso (Rec. p. 7)

> "* * * that Grade No. 3 Common shall not exceed 25% of the total cut and delivery;"

the deduction being that it was necessary to accept all lumber offered, regardless of the grade, since it was

not possible to know whether an excess of No. 3 Common in the early deliveries might not be equalized or reduced to the stipulated 25% of the total in the course of subsequent deliveries.

This argument is falacious and does not bear scrutiny. The first premise appears to be that more than 75% of a better grade than No. 3 Common would be fatal, at least not permissible, under the contract. Such construction is not only inconsistent with the contract as a whole, but is squarely at variance with the wording of the clause in question,

> "* * * Grade No. 3 Common *shall not exceed* 25% of the total cut and delivery."

Obviously a deficiency in No. 3 Common is not penalized. The only requirement, on the other hand, is that No. 3 Common shall not exceed 25% of the total.

Just as clearly, the provision that of

> "* * * all lumber which is not up to grade or in accordance with the specifications, * * * rejection shall be deemed automatically made by second party at time of grading,"

and the further provision for monthly payments of the full purchase price for all lumber previously delivered, require that the contract be construed as severable, month by month, with respect to the deliveries for

which appellee, on acceptance after inspection, was required to make payment.

Even could the language of the contract be reasonably construed as requiring that No. 3 Common should, at the conclusion of the contract, be in no event less than 25% of the total, it is nevertheless perfectly apparent that appellants could have provided against any deficiency in that regard by the simple process of piling and preserving sufficient of the early excess of No. 3 Common for later delivery in the event of such a contingency. Certainly such construction would be more reasonable and would work out more satisfactorily in the end than the holding of the trial court that acceptance of all lumber offered was obligatory, however much No. 3 Common might exceed the stipulated 25% and regardless of the requirement that inferior grades be rejected. That construction interpolates into the contract and imposes on appellants an obligation to accept for any excess of No. 3 Common on appellee's grading, the prevailing market price for that grade of lumber. Such construction does violence, we submit, to the entire contract, which should be considered as whole, and reads into it a radical covenant which it is reasonable to assume that the parties would have incorporated in writing had such been their purpose.

The elementary proposition that courts cannot add to or rewrite contracts but must accept and enforce them as made by the parties is, we contend, violated by the holdings in that regard of the trial court. As said in 13 C. J., 525, Sec. 485,

> "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly, as the court cannot supply material stipulations or read into the contract words which it does not contain."

Also,

> *Hearin vs. Standard Life Ins. Co.,* 8 Fed. (2d.) 202;
>
> *Sorenson vs. Larue* (Ida.), 252 Pac. 494.

Likewise important at this point is the equally elementary rule stated in Sec. 486, p. 525, of the same volume, that

> "A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole."

IV.

NOTICE NOT GIVEN BY APPELLEE

As noted in our opening statement, there was neither proof nor pretense of testimony that notice was at any time given to appellants of the excess above 25% of No. 3 Common lumber, as required by Sec. 5721 of the 1919 Comp. Stat. of Idaho, as a condition precedent to the recovery of damages for breach of warranty on the sale of personal property. This statute, for the convenience of the court, we again quote in full.

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know such breach, the seller shall not be liable therefor."

This section of the Idaho statute is a standard provision of the Uniform Sales Act, and the notice thereby required has been uniformly held, in every jurisdiction where the question has arisen, to be an indispensible condition precedent in the absence of which the buyer is entirely without remedy or standing in

court with regard to any alleged breach in the quality or grade of property theretofore received and accepted.

That appellee appreciated the necessity for such notice is established by the allegation in Paragraph 7 of its affirmative answer and counterclaim (Rec. p. 25)

> "That defendant thereupon immediately and within a reasonable time after learning of such breach, to-wit, on September 18, 1928, gave notice to the plaintiffs in writing that they had breached said express warranty by delivering an excess of grade No. 3 Common lumber in violation thereof."

Hence, it follows, even though all other contentions on behalf of appellants should be rejected, that appellee, by its failure to give the required notice waived any and all grounds for complaint on account of the alleged excess of No. 3 Common lumber, and has no standing in court with respect to its counter-demand.

As said in *Marmet Coal Co. vs. People's Coal Co.*, 226 Fed. 646, 651, with respect to an identical statute,

> "Again, unless defendant gave notice of the alleged breach within a reasonable time after it knew it, defendant has no right of action and no defense. Ohio Code, 8429."

To the same effect,

Block vs. Eastern Mach. Screw Corp., 281 Fed. 777;

United States vs. Dewart Milk Products Co., 300 Fed. 448;

Knobel vs. Bartel Co., 187 N. W. 188;

Massey-Hollis Co. vs. Burnett, 268 Pac. 740;

Williamsburg Stopper Co. vs. Bickart, 134 At. 233;

Hutchinson vs. Renner, 162 N. E. 45;

Nashua River Co. vs. Lindsay, 144 N. E. 224;

Rothenberg vs. Shapiro, 140 N. Y. S. 148;

Regina Co. vs. Gately Furn. Co., 157 N. Y. S. 746;

Eagle vs. Sternberg, 191 N. Y. S. 800;

Canada Maple Exchange vs. Scudder Syrup Co., 223 Ill. App. 165;

Bass vs. Bellofatto, 96 N. J. L. 320, 115 Atl. 302;

Tinsley vs. Gullett Gin Co., 94 S. E. 892.

Respectfully submitted,

O. C. MOORE

and

BRUCE BLAKE,

Attorneys for Appellants.

NO. 6166

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. M. DUNGAN AND EUNICE DUNGAN, His Wife,
Appellants

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division

WAKEFIELD & WITHERSPOON
Spokane, Washington,

and

GRAY & POTTS,
Coeur d'Alene, Idaho
Attorneys for Appellee.

United States
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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee makes this statement of the case for the reason that in the judgment of its attorneys the statement contained in appellants' brief is incomplete and does not properly present the facts upon which the decision was based by the court below.

This action involves the construction of a contract between appellants and appellee for the sale of lumber, and particularly a provision in the contract limiting the amount of an inferior grade of lumber to 25 per cent of the total amount of lumber to be manufactured and delivered thereunder. (Rec. p. 7)

The contract (Rec. p. 4-15) recites that appellants are the owners in fee simple, free from all incumbrance and entitled to sell all of the merchantable White Pine timber, logs and lumber upon certain lands and premises in Latah County, State of Idaho, therein described (Rec. p. 5); that appellants are negotiating for the acquisition of other tracts of timber in Latah County, Idaho, particularly set forth, (Rec. p. 5) and that appellants may, in the near future, acquire an additional tract of timber and other White Pine timber and timber land contiguous or adjacent thereto and within the same logging chance or operation. (Rec. p. 6)

The agreement between Appellants and appellee as set forth in the contract, is that appellants shall sell, cut, manufacture, haul and deliver to appellee, loaded upon its trucks in its mill yard at Elk River, Idaho, all the White Pine timber standing upon the lands described, now owned by appellants or which they may acquire during the life of the contract, which will cut to Grade No. 3 Common or better, rough Idaho White Pine lumber; provided, that Grade No. 3 Common shall not exceed twenty-five percent (25 per cent) of the total cut and delivery, (Rec. p. 6-7-); and that appellee shall purchase such lumber from appellants for the price and upon the terms set forth in the contract. (Rec. p. 7)

The contract expressly provides that each and all of its terms and conditions shall apply to and cover all of said lands and the White Pine timber thereon which may be purchased by appellants during the life of the contract, as

fully as to the lands and timber thereon then owned by appellants. (Rec. p. 7)

The amount of the White Pine lumber covered by the contract is estimated therein at Nine Million Feet (9,000,000) board measure, more or less, but it is agreed that in any event it covers all of the merchantable White White Pine lumber which will meet the specifications required for lumber and which can be cut and manufactured from all of the White Pine timber upon the lands described in the recitals in the contract. (Rec. p. 7)

The total amount of lumber cut and delivered under the contract was Six Million Eight Hundred Fifty-seven Thousand Three Hundred Seven (6,857,307) feet. (Rec. p. 3, p. 24, p. 35)

Appellee paid for all of the lumber delivered at the contract price, except a balance of $15,308.31 which it refused to pay when it was discovered upon completion of the contract that appellants had delivered 780,851 feet of No. 3 Common lumber in excess of 25 per cent of the total amount of lumber delivered. (Rec. p. 45)

Appellants brought this action to recover the balance of $15,308.31, (Rec. p. 2-3-) alleging in their complaint that they had delivered to appellee under the contract, 6,857,307 feet of lumber and that the purchase price had been fully paid except a balance of $15,308.31. (Rec. p. 3)

Appellee answered the complaint, admitting the execution of the contract and the delivery of 6,857,307 feet of lumber cut from the timber designated therein, but

denying generally the other allegations of the complaint. (Rec. p. 21-22)

At the trial apellee by leave of Court filed amendments to the answer, Rec. p.41) admitting the deliveries of lumber and payments as alleged in the complaint. (Rec. p. 30)

Accompanying its answer appellee interposed a counter-claim for the recovery of $14,930.02 on account of the delivery by appellants' of 780,851 feet of Grade No. 3 Common lumber in excess of 25 per cent of the total amount of lumber delivered under the contract. (Rec. p. 22-26) A demurrer to the counter-claim was overruled but a motion to strike portions thereof was sustained as to paragraphs Two, Three and Five and denied as to Paragraph Four. (Rec, p. 28)

In paragraph Five of the counter-claim, which was stricken, appellee alleged that by the terms of said contract the appellants expressly warranted that the total amount of lumber cut and delivered thereunder would not contain more than 25 per cent of Grade No. 3 Common lumber and that at least 75 per cent of the total amount of lumber cut and delivered under said contract would be of a quality better than Grade No. 3 Common lumber. Rec. p. 23-24)

Appellants filed a reply to the counter-claim, denying the material allegations thereof, except as to the total amount of lumber delivered and as to the provisions of the contract. (Rec. p. 29)

During the trial of the case, before the Court sitting without a jury, it was admitted that of the total amount of 6,857,307 feet of lumber delivered, 2,299,971 feet was No. 3 Common; 4,557,336 feet was better grades; and that the excess of No. 3 Common over and above 25 per cent of the total cut and delivery was 780,851 feet. (Rec. p. 45-46) The reasonable value of the No. 3 Common lumber at the point of delivery was shown to be as follows:

In the year 1926	$15.50	
In the year 1927	14.50	
In the year 1988	13.50	(Rec. p. 48)

The Court decided that appellee was entitled to recover on its counter-claim (Rec. p. 50-53) and made special Findings of Fact (Rec. p. 34-37) and rendered judgment thereon allowing appellee the sum of $14,216.02 as a set off against the demand of appellants. (Rec. p. 38-39)

BRIEF OF THE ARGUMENT

1. Appellee did not agree to purchase the excess of Grade No. 3 Common lumber delivered by appellants and did not agree to pay for such excess at the contract price.

2. The subject matter of the contract was an undetermined quantity of timber and the amount of lumber which could be cut and delivered therefrom was indefinite and uncertain.

3. Appellee could not determine that the amount of Grade No. 3 Common lumber delivered would exceed 25 per cent of the total cut and delivered until the contract was fully computed and all the lumber delivered.

4. Appellee was obligated to accept all Grade No. 3 Common lumber delivered from time to time by appellants under the contract and could not reject any delivery because it contained more than 25 per cent of Grade No. 3 Common lumber.

5. The amount of Grade No. 3 Common lumber delivered by appellants was in excess of the amount stipulated in the contract, but having been accepted by appellee and the contract being silent as to the price of such lumber, appellee became obligated to pay the reasonable value of such excess at the time and place of delivery.

Inman v. L. E. White Lumber Company, 112 Pac. (Cal.) 560
R. Krasnow & Sons vs. Emerzian, 247 Pac. (Cal.) 536

6. Where a commodity is sold and no price is fixed, the law fixes a price at the reasonable or market value at the time of delivery.

Wilkins vs. Jackson, 227 Pac. (Okla.) 882
Burger vs. Ray, 239 S. W. (Tex.) 257
Bowser & Co. vs. Marks & Co., 131 S. W. (Ark.) 334, 32 L. R. A. (N. S.) 429
Williston on Sales, 2nd Ed., Sec. 167 Subdivision 4, Sec. 5681, Idaho Compiled Statutes (Uniform Sales Law)

7. As all lumber delivered and accepted was grade No. 3 Common or better, as specified in the contract, but more of Grade No. 3 Common was delivered than appellee

agreed to purchase, the question of warranty of quality is not involved in the case and notice of breach was unnecessary.

ARGUMENT

1. APPELLEE DID NOT AGREE TO PURCHASE EXCESS OF NO. 3 COMMON LUMBER DELIVERED.

This case involves a single clear cut issue, viz., what price should appellee be required to pay for a quantity of Grade No. 3 Common lumber amounting to 780,851 feet delivered by appellants in excess of the amount which appellee agreed to purchase under the contract?

Should appellee be required to pay the full contract price for an inferior grade of lumber which it did not agree to purchase but was required to accept during the performance of the contract and which, admittedly, was not worth fifty per cent of the contract price, or should it be permitted to pay the reasonable market value of such excess at the time and place of delivery?

The answer to this question should be found in a proper construction of the contract and the application of sound principles of law to the facts of the case, rather than by resort to legal fictions which tend to prevent instead of promote justice.

2. SUBJECT MATTER OF CONTRACT

At the time the contract was entered into, appellants owned certain timber which was particularly described in the contract. They were negotiating for the purchase of

other tracts of timber which are also particularly set forth in the contract. It was contemplated that they might acquire additional timber for which negotiations were not then even under way. All of the timber referred to constituted one compact body and one logging chance or operation, (Rec. p. 6) and appellants desired to sell and appellee to buy all the White Pine lumber which could be cut and manufactured from such timber or so much thereof as appellants should acquire during the life of the contract and which would cut to Grade No. 3 Common or better rough Idaho White Pine lumber but with the express agreement that the Grade No. 3 Common lumber should not exceed 25 per cent of the total cut and delivery. (Rec. p. 7)

The subject matter of the contract was an undetermined quantity of timber and an uncertain amount of lumber to be manufactured therefrom. If appellants acquired the timber for which they were negotiating, a greater quantity of lumber would be manufactured and delivered, and if they succeeded in getting the additional tract which they thought they might secure, the quantity of lumber to be delivered under the contract would be even greater. The parties to the contract did not know how much timber would be secured or how much lumber could be cut and delivered under the contract. All such lumber, however, that would cut to Grade No. 3 Common or better was covered by the contract, but the Grade No. 3 Common could not exceed 25 per cent of the total amount delivered.

3. AMOUNT OF GRADE NO. 3 COMMON UNDETERMINABLE UNTIL CONTRACT COMPLETED.

Since the total amount of lumber to be delivered was uncertain while the contract was in the course of performance, the amount of Grade No. 3 Common to be delivered was likewise uncertain. At no time during the performance could appellee determine that the Grade No. 3 Common lumber delivered would exceed 25 per cent of the total amount of lumber which would be manufactured and delivered. The trial Judge aptly stated in his opinion.

> "How can you determine what twenty-five percent of a volume of lumber is without knowing what that volume of lumber is, is beyond my comprehension. How you can determine that the Common under this contract exceeded twenty-five percent of the whole, without knowing what the whole was, is beyond my knowledge of mathematics. It seems to me that in the very nature of things and as inhering in the contract itself, it necessarily contemplates that the contract would have to be performed before anybody would know whether or not the amount of common lumber delivered under it, No. 3 delivered under it, was in excess of twenty-five per cent of the whole, and the contract contemplates the delivery by the plaintiff to the defendant of all the lumber cut upon the lands in question, and the contract does not provide in its terms what is the value of that No. 3 Common which is found to be in excess of twenty-five per cent, and the law applies."
> (Rec. p. 51)

4. APPELLEE COULD NOT REJECT ANY GRADE NO. 3 COMMON LUMBER DELIVERED DURING PERFORMANCE.

The parties agreed that "Grade No. 3 Common shall not exceed twenty-five per cent of the *total* cut and delivery."

The fact that the lumber delivered at any one time or during any one month or even durnig any one year comprised more than twenty-five per cent of Grade No. 3 Common would not permit appellee to reject it, or refuse to accept further deliveries of the same kind as the excess could be off-set during the further performance of the contract. One carload of lumber might contain forty per cent of No. 3 Common and the next carload might contain only ten per cent of the low grade lumber. The percentage of Grade No. 3 Common lumber delivered during one month or one year might be equalized during the succeeding month or the succeeding year. It was only when the total amount of lumber was delivered under the contract that appellee could say to appellants "You have delivered more Grade No. 3 Common lumber than you were entitled to deliver under the contract and more than we agreed to purchase." At any time prior to the completion of the contract appellants had the right to demand acceptance of all lumber grading No. 3 Common and better delivered by them and appellee could not refuse to accept it without subjecting itself to the penalty provided for in the contract for refusal to accept any lumber

delivered thereunder in accordance with its terms. (Rec. p. 14)

The provisions in the contract with reference to grading, inspection and rejection (Rec. p. 12-13) have no application to the amount of Grade No. 3 Common lumber delivered. The grader could only reject lumber which did not grade as good as No. 3 Common and determine the quantities of Grade No. 3 Common and better grades delivered.

5. APPELLEE LIABLE FOR THE REASONABLE VALUE OF THE EXCESS OF GRADE NO. 3 COMMON LUMBER DELIVERED.

When the contract was completed and all the lumber delivered it was determined that appellants had delivered an excess of 780,851 feet of Grade No. 3 Common lumber. They had delivered that amount in excess of twenty-five per cent of the total cut and delivery. What then was the obligation of appellee with respect to this excess? It had not agreed to purchase it, yet it had been compelled to accept it with the lumber which it had purchased. The contract was silent as to the price of Grade No. 3 Common lumber. It contained no provisions as to the value of this grade of lumber found to be in excess of twenty-five per cent of the total amount delivered. As far as the contract price of $32.50 is concerned, appellants had delivered this excess quantity of lumber which was not covered by the contract. What price should appellee be required to pay for it? Manifestly, its reasonable value at the time and place of delivery.

The situation is the same with respect to this excess of Grade No. 3 Common lumber as it was in the case of Inman v. L. E. White Lumber Company, *supra*, where it was held that a purchaser accepting and using a greater number of ties than he had purchased, assumed the obligation to pay for them. In that case the contract fixed the price of ties of the same grade as the excess delivered and the Court held that the contract price was controlling in the absence of all other evidence, stating in the opinion:

> "But if this were not so, plaintiffs could at least recover the reasonable value of the ties in question. No inquiry was made as to the reasonable value, but the contract itself is evidence of this and controlling in the absence of all other evidence."
>
> *Inman vs. L. E. White Lumber Company*, supra, P. 561

6. WHEN NO PRICE IS FIXED THE LAW FIXES THE PRICE AT REASONABLE VALUE.

> "The general rule is that, where a commodity is sold and no price fixed, the law fixes the price at the reasonable or market value at the time fo delivery."
>
> *Wilkins vs. Jackson*, supra, page 884
>
> "If, however, no agreement is come to in regard to the price, and, nevertheless, the buyer keeps the goods, the seller is not without remedy for the law, as is provided in the sub-division (4) of section 9 of the Sales Act, above quoted, would require the buyer to pay a reasonable price."
>
> *Williston on Sales*, supra

> "Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."
>
> Subdivision 4, Section 5681, Idaho Compiled Statutes.

The undisputed evidence in this case shows that the reasonable market price of the excess of Grade No. 3 Common lumber delivered was $15.50 in 1926, $14.50 in 1927, and $13.50 in 1928. (Rec. p. 48)

It was not worth fifty per cent of the contract price. The trial Court held that appellee should pay such reasonable value, stating in the opinion:

> "The legal conclusion, as it appears to me, is fortified by the fact that it comports with the equities and the common honesty of the transaction. The plaintiffs have no right to saddle upon the defendant a quantity of lumber at $32.50 which ,according to the market at the time, was not to exceed half that value, in the face of a provision in the contract which expressly provides that the No. 3 Common shall not exceed a quarter of the entire lumber sold and delivered. If the plaintiffs receive from the lumber that they sold and delivered every dollar that they are entitled to for the seventy-five per cen tof the lumber sold, at $32.50, and receive the market valne of the excess of the No. 3 Common additional, at the time and place it was received by the lumber company, they receive everything that in equity and good conscience they are entitled to, so the equities of the case are in conformity with what I consider to be the law of the case, and the judgement will be accordingly." (Rec. p. 52)

7. WARRANTY OF QUALITY AND NOTICE OF BREACH.

The decision in this case was not based on a warranty of quality. The case was tried and decided on the theory that a quantity of Grade No. 3 Common lumber was delivered in excess of the amount which appellee agreed to purchase at the contract price and that the contract price did not apply to such excess. The trial Court ordered stricken from the counter-claim paragraphs 2, 3 and 5, which set up the defense of breach of warranty of quality. (Rec. p. 27-28) In paragraph 5 of the counter-claim, which was stricken, appellee alleged:

> "That by the terms of said contract the plaintiffs expressly warranted that the total amount of lumber cut and delivered thereunder would not contain more than 25 per cent of Grade No. 3 Common lumber and that at least 75 per cent of the total amount of lumber cut and delivered under said contract would be of a quality better than Grade No. 3 Common lumber." (Rec. p. 23-24)

The allegations in paragraph 7 of the counter-claim with respect to notice of breach, related to the defense of breach of warranty and became unimportant in view of the construction of the contract adopted by the trial Court.

The law does not require notice except in cases where the buyer relies upon a breach of warranty after acceptance of the goods. Section 5721, Idaho Compiled Statutes.

In this case the question involved is not a breach of

warranty of quality of the lumber delivered, but the delivery of lumber which the appellee did not agree to purchase. All of the lumber delivered and accepted was of the quality specified in the contract. It was of Grade No. 3 Common lumber or better. The trouble arises from the fact that appellants delivered entirely too much of the Grade No. 3 Common lumber. They delivered more of the low grade than the appellee had agreed to buy. Appellee was compelled to accept the excess as deliveries were made, because it could not determine that the low grade lumber would constitute an excess until the completion of the contract. The trial Court held that appellee was required to pay the reasonable market price for the excess and not the contract price which was more than double its value. We believe that this holding is based on sound legal principles, as well as justice, and that the judgement should be affirmed.

Respectfully submitted,

WAKEFIELD & WITHERSPOON,
Spokane, Washington
and

GRAY & POTTS,
Coeur d'Alene, Idaho
Attorneys for Appellee

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH DISTRICT

J. M. DUNGAN and EUNICE DUNGAN, his wife,
Appellants,
vs.
POTLATCH LUMBER COMPANY, a Corporation,
Appellee.
No. 6166

PETITION FOR A REHEARING

On Appeal from the United States District Court for the Eastern District of Washington, Northern Division

O. C. MOORE,
and
BRUCE BLAKE,
Office and P. O. Address,
Spokane, Washington,
Attorneys for Appellants.

THE FRANKLIN PRESS, SPOKANE

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Attorneys for Appellants.

PETITION FOR A REHEARING

Appellants hereby petitioning for a reconsideration of the opinion filed on October 6, 1930, and for a rehearing of the above cause, beg most respectfully to show as grounds therefor:

I

Though we would much prefer to avoid what is conceived to be our duty of most respectfully calling attention thereto, there can be no escape from the plain fact that the statement in the opinion that

> "appellant agreed to cut and deliver *in the form of logs* at points to be designated by the appellee all the white pine timber standing on the land they then owned, etc.,"

is altogether erroneous.

Emphasizing this misconception, the opinion further erroneously states,

> "It (appellee) could not reject the excess of each log or small delivery; that would have been impracticable. Nor at the end of the month's deliveries was it feasible to reject the excess; it (appellee) had received logs and manufactured them into lumber."

The contract specifically provides for the delivery, not of logs, but of lumber manufactured pursuant to the specifications attached thereto. The record uncon-

trovertedly shows, furthermore, that all deliveries were of lumber and in no instance of logs.

It is now realized that the opening paragraphs of the contract (Rec. p. 6), standing alone, might lend some justification to the construction placed thereon by the court, but it quickly appears on further reading that appellants were required, as it actually did, to deliver, not logs, but manufactured lumber. Thus, further to quote the contract (Rec. p. 8),

> "Said purchase price shall be paid for such lumber hereinbefore specified upon delivery and loading on lumber trucks of party of the second part, as aforesaid, and subject to the conditions herein contained, as follows: Second party shall pay Thirty-one and 50/100 ($31.50) per thousand feet, board measure, for such lumber as shall have been delivered during the preceding calendar month, as herein specified, according to the scale bill rendered by the scaler or grader as herein provided, such payment of Thirty-one and 50/100 Dollars ($31.50) per thousand feet, board measure, to be made monthly on or before the eighth day of the calendar month following delivery."

Also, as showing a misconception of the contract, the opinion incorrectly states that $1.00 per thousand was to be withheld from the purchase price for deliveries made

> "upon final settlement and upon satisfactory proof that appellant had discharged all claims which

> might constitute *liens upon the logs* and had complied with laws and regulations touching fire hazards and other conditions particularly specified in the contract."

The language of the contract, on the other hand (Rec. p. 9), is that

> "second party (appellee) shall withhold from any sum or sums due from final payment to first parties under this contract the sum of One Dollar ($1.00) per thousand feet for all While Pine Lumber covered by and cut, manufactured, hauled and delivered under the terms and provisions of this contract,"

pending proof of compliance with the laws and regulations touching fire hazards, etc.

Still further on (Rec. pp. 12, 13), the contract provides

> "Second party (appellee) agrees to furnish a grader or scaler, at its own cost and expense. Said grader or scaler shall inspect and grade all lumber covered by this contract,"

and again,

> "First parties (appellants) further agree to remove from the lumber yard of the party of the second part, at their own cost and expense, and within a reasonable time, not exceeding seven days from date of rejection by grader, all lumber which is not up to grade or in accordance with the specifications as herein specified and is, therefore, rejected by the second party. *Rejection shall*

be deemed automatically made by second party at time of grading."

The errors in the court's construction of the contract, to which attention is called, are not merely of form but of substance.

Erroneously considering the contract as providing for the delivery of logs instead of lumber, the opinion, as a ground for the construction of the contract adopted by the court, states

> "It (appellee) could not reject the excess of each log or small delivery; that would have been impracticable. Nor at the end of the months' delivery was it feasible to reject the excess; it (appellee) had received logs and manufactured them into lumber."

Obviously, the objections advanced with respect to logs (logs not being involved) could have no application to the deliveries of lumber required and made under the terms of the contract.

The contract was prepared by appellee (Rec. p. 49). Hence in case of uncertainty it must be construed most favorably to appellants, and it is elementary, of course, that its true meaning must be determined from the consideration of the entire instrument, from which it follows that each and all of the above paragraphs must be considered together and not separately. The

contract provides for rejection by appellee's grader of

> "all lumber which is not up to grade or in accordance with the specifications"

attached to the contract. It further provides for payment on or before the eighth day of each calendar month

> "for such lumber as shall have been delivered during the preceding calendar month"

according to the scale rendered by appellee's scaler or grader.

The provisions of the contract just noted are in no wise mentioned in the recent opinion nor does the opinion state any reason *why* it was not feasible to reject the excess; i. e., the excess at the end of the months' deliveries of No. 3 grade lumber, pursuant to the terms of the contract. The contract expressly provides for monthly settlements in accordance with the scale bill of appellee's grader. It further provides for automatic rejection of all lumber not up to grade. Hence, as said at the bottom of page 32 of appellants' brief, on this appeal

> "The contract must be construed as *severable,* month by month, with respect to the deliveries for which appellee, on acceptance after inspection, was required to make payment."

This contention goes to the very gist and essence of the case and appellants respectfully submit that a misapprehension of the facts of the case upon this point has led the Court into error in its judgment and affords a just ground for a rehearing and reargument.

Certainly the parties, both of whom were fully aware of their rights, fully competent to contract in regard to the business in hand (appellee, a large operator, being especially familiar with the various phases of the lumber business involved in the transaction), had a right to make such a contract. They did make it and it cannot be said that rejection, on monthly settlements, of any excess of No. 3 Common lumber thereby required, was unconscionable, unreasonable or invalid in any sense. We respectfully submit, therefore, that it was not only "feasible" and not "impracticable" to comply with the provision for monthly settlements, but it was complied with during a period of more than two years, and up to the last month, at the conclusion of deliveries. That these monthly settlements should in all fairness be held final and conclusive appears, not only from the circumstances that up to the last month they were made without reservation, but also from the surrounding conditions disclosed by the record and by a careful con-

sideration of the nature of the transaction.

In suggesting that a monthly settlement was not feasible or practicable, the court evidently overlooked the provision in the contract that the rejected lumber, if any, should be hauled away by appellant, within seven days after rejection.

Even if there were difficulties in settling the transaction in the manner provided by the contract, that is, by monthly settlements, such as those suggested by the court, these difficulties were inherent in the contract and were of the appellee's own making. We think we have demonstrated, however, that as a matter of fact, there were no such difficulties; and that such as are suggested are wholly imaginary and that a monthly settlement, as provided by the contract, was not only feasible and practicable but was by far the simplest and easiest, as well as, the justest manner in which the questions at issue could have been determined.

As the lumber company (appellee) had the advantage of doing the grading and its own report was final and conclusive, appellants should not only be given the full advantage of all doubtful provisions as drawn, but the contract as a whole should be construed strictly in their favor.

The importance of our ~~own~~ contention that there could be no correct interpretation of the contract under the misconception of its provisions, evidenced by the recent opinion, yields to demonstration. Had the deliveries been of logs instead of lumber there would not have existed, for appellants, the opportunity for improving the grades which would have been afforded by notice to appellants that the lumber delivered was not up to specifications. Had appellants been notified of the claimed inferiority of the lumber delivered, they could have immediately taken steps to remedy the defects and avoided the claimed excess of No. 3 Common. Such notice would also have enabled them to check up on the grades and thus they would have been in position to determine, on their own account, whether they were getting a fair deal, an honest deal, at the hands of the purchaser of the lumber, and to have taken such steps as might have been deemed necessary for their own protection in the event of unfairness or dishonesty, any provision of the contract to the contrary notwithstanding. It is elementary that no contract, however stringent its terms, can be used as a vehicle for the promotion of dishonesty nor be allowed to stand as a shield for the protection of fraud.

Appellants' claim of waiver and estoppel is bottomed

on this lack of notice and their consequent omission to collect evidence and take such other steps as might have appeared necessary for their own protection.

The opinion of the court suggests that if lumber had been rejected on each months' delivery, Dungan would have protested that such rejection was not to be made until the whole amount had been delivered. We are not able to perceive by what course of reasoning the court arrives at this conclusion or assumption. There is no circumstance whatever upon which to conclude that Dungan would have made any such protest and it is unreasonable to assume that he would have done so in the face of the express provisions of the contract. Dungan would have had no right to make any such protest, since the contract expressly provides for grading, monthly or earlier removal of all rejected lumber, and monthly payment for the deliveries of the preceding month.

As to the objection set forth, both in the opinion of the lower court and of this court, that a monthly settlement could not be made because it was impossible to say whether there was more than 25% of No. 3 Common lumber out of the whole amount to be delivered until the whole lot had been delivered, we respectfully submit that the method stipulated by the contract was entirely practicable. Had rejections been

made in connection with the monthly settlements, Dungan would have had current notice of his status in the matter and could have regulated his future deliveries accordingly. There would have been no such insuperable difficulty, as suggested but not designated by the court.

There would have been no differences to settle if the rejections had been made each month. There could not have remained at the end of the transaction a surplus of No. 3 Common lumber (that is, more than 25% of the whole),—as the rejections would have been made each month of any excess of No. 3 over 25% of the whole delivered up to the time of each settlement. All that would then have remained to do would have been to settle for the last month's deliveries according to the terms of the contract.

Having provided in the contract that the lumber company should pay each month for the lumber graded and accepted during the preceding month, and that Dungan was to remove within seven days all rejected lumber, and these settlements having been made as stipulated each month up to the completion of the contract, without a single rejection and without notification to appellant to remove any lumber, we submit in all sincerity and earnestness that appellee is now *estopped* from reopening these settlements.

II

The recent opinion recites, as though an undisputed fact, that on completion of the operation it was found that there were 780,851 feet of No. 3 Common in excess of the 25% permitted by the contract. The record shows, on the other hand, that Special Finding of Fact No. 5 (Rec. p. 36), indicating that amount of No. 3 Common in excess of 25% of the total cut and delivery of lumber, was excepted to below (Rec. p. 37) and assigned as error in perfecting the appeal (Assignment of Error No. 10, Rec. p. 71), and that the objection to said finding is carried into the record as Specification of Error No. 10, on page 16 of appellants' brief.

Moreover, it was specifically pointed out in the oral argument that Special Finding No. 4 fixing 25% of the total delivery at 1,519,112 ft. is a plain error in computation. The correct quotient of 6,857,307, the total delivery, divided by 4 is 1,714,326 ft., making a difference in appellants' favor in the amount of No. 3 Common that appellees were required to take within the 25% limit of 585,647 ft., upon which basis appellants are entitled to a judgment of more than $3,000 in excess of that which they were awarded at the trial.

Surely this is a matter of sufficient importance to be worthy of consideration, and of itself justly calls for a rehearing.

Respectfully submitted,

O. C. MOORE,
and
BRUCE BLAKE,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL

We, the undersigned, counsel and attorneys for appellants and petitioners in the above entitled cause, hereby certify, each for himself and not one for the other, that in our judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

O. C. MOORE,
BRUCE BLAKE.

No. 6167

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

The Filmer Bros. Electrotype Co., San Francisco—7—15—30—60

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOHN L. McNAB and S. C. WRIGHT, Esqrs., 1 Montgomery Street, San Francisco, California, Attorneys for Plaintiff.

GEORGE J. HATFIELD, United States Attorney, Post Office Building, San Francisco, California,
Attorney for Defendant.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

18,430—K.

SIDNEY T. BURLEYSON,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT.

The above-named plaintiff complains of the said defendant, and for cause of action alleges:

I.

That at all the times herein mentioned plaintiff was and still is a citizen of the United States of America, and a resident of the City and County

of San Francisco, State and Northern District of California.

II.

That this action is brought under and by virtue of the War Risk Insurance Act and the World War Veterans' Act, and amendments and supplements thereto, and is based upon a term policy or certificate of war risk insurance issued under the provisions of the said War Risk Insurance Act, approved October 6, 1917, and acts amendatory thereto to the plaintiff by the defendant.

III.

That on or about the 30th day of July, 1918, at Paris Island, South Carolina, the plaintiff enlisted in the armed forces of the defendant; that he served defendant as a private of the United States Marine Corps until the 10th day of July, 1919, when he was honorably discharged from the said Marine Corps, and that during all of the said time he was employed in the active service of the defendant. [1*]

IV.

That immediately after enlisting in the defendant's said Marine Corps the plaintiff made application for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress, and the rules and regulations promulgated by the War Risk Insurance Bureau established by said Act of Congress in the sum of ten thousand dollars ($10,000) and that thereafter there was

*Page-number appearing at the foot of page of original certified Transcript of Record.

issued to plaintiff by the said Defendant's War Risk Insurance Bureau its certificate No. T —— of his compliance with the War Risk Insurance Act, so as to entitle him and his beneficiaries to the benefits of said Act, and the other Acts of Congress relating thereto, and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, and the directors thereof, and that during the term of his service with the said Navy Department as aforesaid, there was deducted from his pay for such services by the defendant through its proper officers the monthly premiums provided for by said Act of Congress, and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, and the directors thereof.

V.

That during the month of April, 1919, and while serving the defendant in its said Marine Corps, the plaintiff sustained fallen arches in both of his feet, and which condition later developed into what is known as thrombo engitas obliterance. That said disability has continuously since the date of his discharge from the defendant's Marine Corps rendered and still renders the plaintiff unable to follow his former occupation of salesman, or any substantially gainful occupation; and such disability is of such a nature and founded upon such conditions that plaintiff is informed and believes, [2] and so states the fact to be, will continue throughout the lifetime of the plaintiff in approximately the same degree, or in a worse degree. That ever since his

discharge from defendant's Marine Corps plaintiff has been permanently disabled as a result of the injury sustained by plaintiff while in the service of the defendant as aforesaid, and is now wholly and permanently disabled as a direct result therefrom.

VI.

That the plaintiff made application to the defendant through the United States Veterans' Bureau, and the directors thereof, and through the United States Bureau of War Risk Insurance and the directors thereof for the payment of said insurance and for the monthly payments due under the provisions of said War Risk Insurance Act for total and permanent disability, and that said Veterans' Bureau; the said Bureau of War Risk Insurance, and the directors thereof have refused to pay to plaintiff the amount provided for by the War Risk Insurance Act, and the amendments thereto; and on the 14th day of December, 1926, disputed the claim of the plaintiff to the benefits of the said War Risk Insurance Act, and have refused to grant plaintiff said benefits, and have disagreed with him concerning his rights to the insurance benefits or such Act ever since the said 14th day of December, 1926, and still does disagree with him concerning the same.

VII.

That under the provisions of the War Risk Insurance Act, and the other Acts of Congress amendatory thereto, plaintiff is entitled to the payment of $57.50 for each and every month transpiring since

the date of his discharge from the said defendant's Marine Corps, to wit: July 10, 1919, and continuously thereafter so long as he lives, and continues [3] to be permanently and totally disabled.

VIII.

That plaintiff has employed the services of John L. McNab, an attorney and counsellor at law, duly admitted to practice before this court, and all courts in the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services is ten per centum (10%) of the amount of insurance sued upon and involved in this action payable at a rate not to exceed one-tenth (1/10) of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924.

WHEREFORE, plaintiff prays judgment as follows:

First: That plaintiff since the 10 day of July, 1919, has been, and still is, totally and permanently disabled as a result of an illness and/or injury contracted in the line of his duty while in the active service of the United States of America.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of $57.50 per month for each and every month from said 10th day of July, 1919, and so long as he lives and remains permanently and totally disabled.

Third: Determining and allowing to plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insur-

ance sued upon and involved in this action, payable at a rate not exceeding one-tenth (1/10) of each of such payments, until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924; and such other and further relief as may be just and equitable in the premises.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff. [4]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Sidney T. Burleyson, being first duly sworn, deposes and says: That he is the plaintiff named in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge; except as to those matters which are therein stated upon his information and belief, and as to such matters he believes it to be true.

SIDNEY T. BURLEYSON.

Witness:
J. A. BROOKS.

Subscribed and sworn to before me this 23d day of May, 1929.

[Seal] ALBERT J. BRYANT,
Notary Public for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 24, 1929. [5]

[Title of Court and Cause.]

ANSWER TO COMPLAINT.

The United States of America for answer to the complaint of plaintiff herein denies each and all of the allegations thereof.

WHEREFORE, defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein incurred.

GEO J. HATFIELD (Signed).
GEO. J. HATFIELD,
United States Attorney.
GEO. M. NAUS,
Assistant United States Attorney.
CHELLIS M. CARPENTER,
Assistant United States Attorney.

Service of the within answer by copy admitted this 3d day of September, 1929.

JOHN L. McNAB,
Attorney for Plaintiff.

[Endorsed]: Filed September 5, 1929. [6]

[Title of Court and Cause.]

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

To the Plaintiff Above Named and to Messrs. John L. McNab and S. C. Wright, His Attorneys:

You, and each of you, will please take notice that

the attached constitutes defendant's proposed bill of exceptions.

GEO. H. HATFIELD,
United States Attorney,
Attorney for Defendant. [7]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 16th day of October, 1929, the above-entitled cause came on for trial; Messrs. John L. McNab and S. C. Wright appearing for the plaintiff, and Messrs. Geo. J. Hatfield, United States Attorney for the Northern District of California, and Herman Van Der Zee, Assistant United States Attorney for said District, appearing for defendant; a jury was impaneled and sworn and an adjournment was then taken until October 17, 1929, upon which day the following proceedings took place:

TESTIMONY OF SIDNEY T. BURLEYSON, IN HIS OWN BEHALF.

SIDNEY T. BURLEYSON, the plaintiff, called in his own behalf, being first duly sworn, testified:

Mr. McNAB.—It is stipulated, if your Honor please, between the United States Attorney and myself that there will be no necessity for offering any proof to the effect that the usual certificate

(Testimony of Sidney T. Burleyson.)

or policy issued after his enlistment in [8] the Marine Corps.

I have here, if your Honor please, one of the usual forms issued by the United States Government, and I ask that I may be permitted to offer that in evidence so that the jury may be familiar with the terms of it.

Mr. VAN DER ZEE.—No objection. May I be permitted hereafter to withdraw that as an exhibit, as it belongs to another person?

The COURT.—Yes.

Direct Examination.

My name is Sidney T. Burleyson, the plaintiff in this case. I am 29 years old; born January 4, 1900, in Bilen, Mississippi. Up to the time of my enlistment in the Marine Corps, I had been on a farm for years and then I went to work for about three months, I guess it was, in a drygoods store. Prior to that time I never worked at anything other than farming. I was 18 years old when I enlisted in the Navy; I enlisted at Memphis, Tennessee; I went, thereafter, to Paris Island, South Carolina.

I was discharged from the army on July 10, 1919; the document which you hand me is my certificate of discharge that was handed to me at the time of my discharge from the Marine Corps.

Mr. McNAB.—I offer this in evidence, if your Honor please.

Mr. VAN DER ZEE.—I will object to that, if your Honor please, upon the ground that it serves

(Testimony of Sidney T. Burleyson.)

no purpose at all. The witness has testified as to the date of his discharge. The record won't amplify that. [9]

Mr. McNAB.—It shows, if your Honor please, that he was discharged from the Army under the report of a medical survey.

The COURT.—The objection will be overruled. It will be admitted.

Mr. VAN DER ZEE.—Exception.

(The document was thereupon marked Plaintiff's Exhibit No. 1.)

The WITNESS.—My discharge from the Marine Corps was ordered; I made no application for discharge. After I commenced my service in the Marine Corps, I was stricken with influenza about November, 1918, at Quantico, Virginia.

Mr. McNAB.—How long were you in the hospital there?

A. About six weeks.

Mr. VAN DER ZEE.—Objected to as immaterial, irrelevant and incompetent. This is not one of the diseases mentioned in the complaint, nor is it alleged as one of the elements of his permanent total disability. The complaint restricts it to thrombus angiitis obliterans.

Mr. McNAB.—That may be quite true, but the medical evidence will show that these are essential elements of the progressive development of the disease.

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

(Testimony of Sidney T. Burleyson.)

The WITNESS.—Thereafter I was sent back to duty at Quantico, Virginia. I was transferred shortly after to the U. S. S. "Albany." The cold remained with me for a while and later on when I got to Pearl Harbor this other stuff developed, the appendicitis. During the time I was afflicted with influenza I was under the care of the Navy physicians on the steamship "Albany." [10]

Mr. McNAB.—Q. When did the appendicitis break out?

Mr. VAN DER ZEE.—Just a moment. Object to it as irrelevant, immaterial and incompetent and not within the issues of the complaint. It is not mentioned in the complaint.

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

Mr. McNAB.—Q. When were you affected with appendicitis?

Mr. VAN DER ZEE.—The same objection.

Mr. McNAB.—We will stipulate, if your Honor please, if it would save the Court any time, that the objections may be deemed to have been made.

Mr. VAN DER ZEE.—And exceptions?

Mr. McNAB.—And exceptions too.

The WITNESS.—In February, 1919. At the time I was stricken with appendicitis I was in Honolulu Harbor; I was taken to Pearl Harbor about nine miles away, where I had an operation for appendicitis. Soon after I got out of bed the doctors began to look around to see what was the

(Testimony of Sidney T. Burleyson.)

cause of it, and looked at my tonsils, which they said were in bad condition and had to come out.

Mr. VAN DER ZEE.—I will ask my objection and exception to the Court's ruling on all of these questions be allowed to run to questions except those affecting the particular physical disability mentioned in the complaint.

The COURT.—It will be so understood.

The WITNESS.—About twelve days after my operation for appendicitis I was operated on for for the removal of my tonsils. I had not been removed from my hospital cot at any [11] time between the operations. I was discharged from the hospital about twenty-three days after my last operation; I was pretty weak when I went to duty. I was on light duty for a while, and I could not tell the exact date I was ordered back to active duty. By light duty I mean work around the barracks; it was not considered much light duty because we had to carry garbage cans and things like that. I think I was *order* back to drill in about a week. After I was ordered back to drill and heavy duty I had terrible pains in my legs, down to my feet, and my arches dropped down then. It was within about twelve days that my arches dropped; at the beginning of the twelve-day period my arches were normal and at the end of that period they were down, they dropped clear down, there was no arch; that condition has existed ever since. It was accompanied with pain. My feet and lower limbs at that time just swelled up, I could hardly feel my

(Testimony of Sidney T. Burleyson.)

ankle; they swell up so big I cannot stand on them at all. When I went to the hospital for ten or twelve days, they were swelled up so big I could not use them at all. I was not able to stand up, not for a long time. That condition with regard to my arches and the flatness of my soles has not changed. I was sent to the hospital for about six weeks. I was sent from the hospital on board a ship and a medical survey was held out in the Islands and I was sent back on the ship to Mare Island and discharged there. I went through a medical survey at the Islands first; a board of doctors commanded they discharge me from service on disability. I had not made any application whatsoever for such a survey. That was ordered by my officers. From there I went back to Mare Island where I was discharged. None of this was on any application of mine. [12]

I could not get around at all; if I would move around a little bit it would get so painful sometimes that I would almost collapse. That extended up my legs; the swelling went up about half of my legs. Yes, I will remove one of my socks so that you may see the condition; that is the general appearance of it and if I move around much it will be bluer than this; for a long while, while I was working, there were running sores all over my toes; they would swell up and crack open, and matter and foreign material would come out. When I have endeavored to work they would all swell up; my toes would crack open and bleed like the dick-

(Testimony of Sidney T. Burleyson.)

ens; it got so painful that I could not stand up; I never have worked constantly. The skin would break open; it would swell up and break open, and the skin would come off, and it would be nothing but raw. It would disclose the red tissues underneath; that has been the result whenever I have endeavored to remain on my feet for any length of time. Since my discharge from the Marine Corps I have endeavored to work; I had to work; I had no other way of living.

At the time I enlisted in the Marine Corps I was subjected to quite a lengthy physical examination. After this trouble developed I made an application to the Veterans' Bureau for insurance but they turned me down; that is, my application has never been granted. After I came out of the service I first attempted to work as a clerk for the Government at Mare Island. I handled containers. When I was required to be on my feet they just got so bad, badly swelled up—I had a mighty fine boss, and he would let me off quite often, and I would go home and lift my foot until I got the blood back down again—it swelled up so bad, it [13] ached so bad, I put them on pillows and got relief that way. I was acting under a physician's instructions when I kept my feet lifted. The physicians told me I should keep off my feet, but I had to work to make a living. There has been no time since my discharge when I have been able to work continuously and without interruption. I have never worked over six weeks without having a day

(Testimony of Sidney T. Burleyson.)

off; it would get so bad I would have to be off. At other times I would have a greater length of time off. I had to finally quit work there at Mare Island.

Mr. McNAB.—Q. Why did you have to quit?

Mr. VAN DER ZEE.—I object to that as calling for the opinion and conclusion of the witness.

The COURT.—He can state what happened. The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

Mr. McNAB.—Q. Why did you have to quit?

The WITNESS.—My feet got swelling up so badly I could not get around at all, I had to lay off for about a month and it did not do any good, I went back, but I could not stand on my feet; it required me to be on my feet quite a bit. I next worked for the Southern Pacific; I started to work as cashier. I had a stool that I sat on quite a bit. I think I worked there about two weeks or thirteen days something like that, and I laid off about three weeks before I went to work again, I think about that. I had to lay off the three weeks because my feet were in such bad condition that I could not get around. I have attempted to work from time to time. I have never been able to continue in any of these positions; my physical condition always compelled me to quit. It has been over a year now since I have [14] attempted to do any work at all. From time to time while I was in these various places attempting to work, I have had physicians attending me; I hired them and paid

(Testimony of Sidney T. Burleyson.)

them myself. They were giving me treatments during this period of time. They relieved me while I was off my feet, but when I went back to work again the same thing would come back again. The only time that I get any physical relief is while I am lying down and keeping my feet elevated to keep the blood down.

Mr. McNAB.—Q. What have your attending physicians advised you to do in order to get any kind of relief?

Mr. VAN DER ZEE.—Just a moment. Objected to as calling for hearsay.

Mr. McNAB.—I would not ask it if it were not for the fact that I expect to connect it up.

The COURT.—The objection will be overruled subject to a motion to strike unless it is connected up.

Mr. McNAB.—Q. What have you been advised by the physicians you must do in order to get relief?

A. I must keep off my feet and keep them elevated most of the time.

The WITNESS.—I have endeavored to follow that advice every day. I have had treatment in the Government hospital at Palo Alto twice since my discharge. I first went there last year, some time in July. I was there about six weeks, and then I was out for about seventeen days and went back, a little over six months. During the last six weeks I was there first they were putting iodine and things like that on my feet down there. It did not help

(Testimony of Sidney T. Burleyson.)

me any that I could see. Most of the time I was in bed. The first time I was there my feet were given some treatment and [15] then they recommended an operation; then when I went back they did not give it to me; they put my feet in casts up to here, plaster casts, very tight. I had to have them taken off they got so painful, in about four weeks. There was no improvement in my limbs; I could not walk then at all until I had those taken off. After I came away from the base hospital the second time I came to the Herald Hotel and I was there about twenty-five days, and I went into the Letterman Hospital, about the latter part of March. The attending surgeon at the Letterman Hospital was Major Murrell; he was the superior. I was under treatment there about four months; I was a bed patient. I came out June 28th; my condition had not changed at all that I could see, but I got out and walked around a little bit and they were swelling up again, so I stayed around the Herald Hotel for a day. Since I had these casts taken off my feet I have been using double crutches. That was in the base hospital at Palo Alto; that was in March. Prior to my having double crutches, I used a cane to assist myself.

Mr. McNAB.—Q. Have you been able to find any kind of work that you have been able to remain at continuously, however light?

A. No.

Mr. VAN DER ZEE.—I object to that as calling for the opinion and conclusion of the witness.

(Testimony of Sidney T. Burleyson.)

Mr. McNAB.—I think he ought to know.

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

Mr. McNAB.—Q. You say you know?

A. Yes.

Q. Do you know of any form of work that you have ever come in contact with that you are able to remain at? A. No.

Mr. VAN DER ZEE.—The same objection. [16]

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

Cross-examination.

(By Mr. VAN DER ZEE.)

I made application for the relief mentioned in my policy of War Risk Insurance. At the time that I filed my application for compensation, one of the members of the Board that was there when the application was made out—I asked him about the benefits under that, and he said, "No, you are not entitled to any."

Mr. McNAB.—I neglected to ask one question: Q. At the time of your discharge from the Army, did you cease paying your premiums on your policy or did you continue to pay them?

A. I paid them for about six or seven months.

Q. After your final discharge from the Army?

A. Yes, sir.

Q. And during all that period of time you were afflicted as you are now? A. Yes.

(Testimony of Sidney T. Burleyson.)

Mr. VAN DER ZEE.—Q. You say you made a claim for the insurance benefits?

A. Yes, sir.

The WITNESS.—The date I applied for compensation was December 14, 1926; I asked at the same time a member of the aboard about insurance benefits, and he said you would have to be totally disabled at the time before you could get it. That is what I was told. December 14, 1926, is the first time that I made any claim of any character for compensation insurance or any other relief from the Government; the man on the rating board turned me down; I don't know his name; he was on Rating Board No. 3. [17] I have never received any communication from the Director of the United States Veterans' Bureau denying any claim of mine for War Risk Insurance benefits. I was discharged from the service on July 10, 1919. I first went to work, after leaving the service, for the Government at Mare Island. They did not give an examination for that position; just went over you in a way. It was a Civil Service position. They just examined my heart; yes, I had to pass a physical examination. I was given a clerical position in the Supply Department. I was container recorder; I handled the serial numbers on the gasoline tanks and things like that. I was known as a store man. That was in 1919.

Mr. VAN DER ZEE.—Q. In 1919 didn't you work as rivet heater?

A. They gave it a rating of that.

(Testimony of Sidney T. Burleyson.)

Q. Didn't you work during 1919 as a machinist's helper for a period of approximately six months?

A. That was the same thing.

Q. What work did you actually do? I would like an answer to that question, whether you worked at it or not. I want an answer to the question. Did you work as a rivet heater? A. All clerical.

The WITNESS.—I worked as a storeman; I was at the Navy Yard on those various jobs during all of 1919 after my discharge; my employment continued from July, 1919, to August, 1920. After I left that position I was next employed with the Southern Pacific at Tracy. I was cashier in the restaurant. I do not remember just exactly the date that I went to work there it was some time in the latter part of August or September. I did not go there directly from my Mare Island employment. I got a thirty-day leave of absence, they granted it to us at the end of the year, so I did not [18] work the thirty days. I was on the Government pay-roll but I was on vacation. I was off a month there; I was treating myself there for a month. I worked for the Southern Pacific as cashier in the restaurant department—well, I was off for about—let me see; my first work was about fourteen days, and the next was about seven months, six or seven months. I worked two weeks and laid off, for about a *a* month, and I worked then for about five or six months, something like that. I was not working every day. A lot of that time I was off. I was not on that job all of that time be-

(Testimony of Sidney T. Burleyson.)

tween August, 1920, and November, 1922. I was only on there about fourteen days, first. After fourteen days, I was off for a while and went to Yuma, Arizona, for the Southern Pacific; I worked in the clubhouse as a clerk. I stayed at that employment about five or six months when I quit. I was off a number of times during that period of time. When I applied for employment by the Southern Pacific I was subjected to a physical examination; I passed one physical examination applied by the Southern Pacific Company upon application for employment. At that time they did not tell me of any disability of the feet; the doctors did not ask me if I had any disability of my feet.

The photostatic copy of a writing which you show me is signed by me; it is my signature. I do not recall where I have seen that writing before. All I did was, they asked me to sign my signature; I never looked over that. It is my signature. Yes, I recall an examination by Dr. Mangin, of the Southern Pacific, on July 6, 1923. I went in there but I did not go to work; I went up to Lake Tahoe instead. I recall my answers to his questions as to my physical condition, regarding various organs at that time. [19] I do not just recall that he asked me from what diseases I had suffered and when. I don't remember that the doctor asked me if I had any diseases of the feet. The photostatic copy you show me purporting to be a physical test record—yes, that is my signature. Referring to the balance of that report, I recall now a second physi-

(Testimony of Sidney T. Burleyson.)

cal examination; yes, I went in there; I did not go to work. That is what I meant to say; I did not go to work; yes, I now recall that there were two physical examinations given me by the Southern Pacific Company. My last employment by the Southern Pacific Company was in 1923, I think; I did work for them off and on. The last time I worked for them was 1923. My salary at that time was $90.00 a month and found, I think.

I was next employed as a hotel clerk at the Merritt Hotel in Oakland for about a month and a half. I do not remember what my salary was there. After that I worked for the Emporium in San Francisco; I worked there, but I was off a number of times during that time; I was not working consecutively. I was given a physical examination upon going to work there, just my heart and lungs, that is all. After that examination, I was given employment by the Emporium. I recall working in the Hotel Del Monte in Monterey for about two months; I was employed in the storeroom there. My salary there was about $50.00 a month and found.

In 1925, the first of that year, I went to work for the Fox Hotel, in Taft, California; I worked there for something like a year and a half, but I did not work steady; I was off a number of times during that time. I started at a salary of $125.00; that did not include my [20] board. I was night clerk at the hotel. I left the employment of the Fox Hotel in Taft in June, 1926, or thereabouts; I laid off; I was feeling so bum I laid off for a

(Testimony of Sidney T. Burleyson.)

long while. I was off for a month, then I went to work as a hotel clerk at Tahoe Tavern; I worked there about three months until October 26th, then the season closed, but I could have gone back there, but the doctor told me if I came back there in winter time he said I would be frostbitten and I would lose my legs. The Tahoe Tavern closed for a few months and opened in December. My salary on that job was $125.00 and found. When I left the Fox Hotel in Taft I did not know anything about where I was going. Yes, I got a larger salary at Tahoe Tavern. I met one of my friends downtown and I told him I had left down there, Mr. Smith, the Assistant Manager of the Whitcomb Hotel—yes, I got a larger salary at the Tahoe Tavern than at the Fox Hotel in Taft, but I could not hold the job, I got so bad. I next went to work for the Whitcomb Hotel in San Francisco as clerk. I worked there about five weeks. My salary there was $90.00 and meals. I got so bad, my feet began to swell up, and I could not stay there and I quit. I was off for a month or six weeks. I took a rest and went up to the Granada Hotel. I was there just a short time at the Granada and then I laid off, got so bad with my feet I could not stand it, so I left there and was off about six weeks and went to work at the Worth Hotel. My salary at the Worth was $125.00, straight salary. I worked there a little over a year. I left my employment at the Worth Hotel the latter part of June; somewhere thereabouts, or May; but I was in the Palo Alto Hospital

(Testimony of Sidney T. Burleyson.)

in August; I could not have been at the Worth Hotel in August. I went to night school for a while [21] during the time I was working at the Emporium. I went for about two or three months, something like that. I do not think it was nearer six months. My attendance at night school was irregular.

While I was working at the Worth Hotel I went every day for almost a year, taking treatments, as the records will show—I took treatments down at the Veterans' Bureau for almost a year, or over a year, nearly every day. They were light treatments for the broken skin and sores. Dr. Jeppel and Dr. Casey gave them to me. They did not make a thorough examination. They sent me to Dr. Alderson and Wade, and they told me I should be in the hospital. I called up the Veterans' Bureau and told them, and I went down there, and they sent me to Palo Alto Hospital. I went there for observation and treatment. I don't remember the exact day I went to Palo Alto.

No, I did not at any time before the year 1826 make any claim at all for disability compensation on the United States Government. I signed a waiver—I would like to explain that if you do not mind. When I left the service in 1919 I had to sign a waiver, and so up until that time I didn't know whether I had any claim or not, but I got so bad, and I saw one of the veterans, and was talking to him, and he said, "Why don't you go down to the Bureau?" and so when I went down to the Veterans'

(Testimony of Sidney T. Burleyson.)

Bureau they told me, "You should have come in before." I would have gone there before, but I didn't think I had any claim. He told me that waiver did not mean anything. I do not recall how that waiver read. I only mention that because this other veteran told me what I have just related. At any rate, I made no claim upon the United States Government or did not go to the Veterans' Bureau or any other branch of the Government [22] for relief until 1926.

Redirect Examination.

(By Mr. McNAB.)

When I left the service, before I got my discharge at Mare Island I had to sign this waiver of any claim. I read part of it, and it said, "I waive all claims for treatment in the hospital and for any compensation." I thought that ended my claim. I was first informed that my signature on such a waiver amounted to nothing on December 13, 1926. I went the following day to the Veterans' Bureau. The Bureau did tell me they would not grant me disability. I was orally informed to that effect by one of the members of the rating board number three here in San Francisco. I have never been granted insurance on the basis of total disability. After being so informed, I commenced this suit. A number of places have been mentioned here where I have been employed, seven or eight, my employment at each one of them terminated because I would get so bad I had to quit and take a rest. I

(Testimony of Sidney T. Burleyson.)

never would advise the people where I was employed of my condition because I figured that would hurt my getting another position after I got out. When I left their employ finally I had no dispute with any of them, it was just on account of my physical condition. In these night clerk jobs I was not required to be on my feet very much. For instance, taking the Hotel Worth, my hours there were from eleven at night to seven in the morning. I had very little to do there. I had a big wicker chair and I used to sit with my feet up like this most all night long, because the doctors had advised me to do that, to keep off of them as much as I possibly could. I sometimes wrapped a blanket around me. [23]

Mr. McNAB.—Q. Was there any work heavier than that that you were able to perform?

Mr. VAN DER ZEE.—Objected to as calling for the opinion and conclusion of the witness.

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

The WITNESS.—No.

I went to the Veterans' Bureau for about a year for treatment. I did not get any better. I never had my feet examined by any Southern Pacific official. When I went looking for a job, I was not telling them of my trouble with my feet; if I had I would not get a job.

Mr. McNAB.—Will the United States Attorney now admit that, at the end of this prolonged examination, which he has spoken so volubly, by the

(Testimony of Sidney T. Burleyson.)

Southern Pacific, that the Southern Pacific rejected this man at that time? Then I offer it in evidence. Do you object to it?

Mr. VAN DER ZEE.—No.

(Document marked Plaintiff's Exhibit No. 2.)

The WITNESS.—I never occupied a position as rivet heater. I do not know anything about rivet heating, nor do I know anything about working as a machinist. I was working as a clerk all the time I was there. I am a resident of the City and County of San Francisco, State of California, and have been ever since my discharge from the service. I am a United States citizen.

TESTIMONY OF WILLIAM COOPER EIDENMULLER, FOR PLAINTIFF.

WILLIAM COOPER EIDENMULLER, called as a witness on behalf of the plaintiff, being first duly sworn, testified: [24]

I am a physician and surgeon practicing in the City of San Francisco. I am a graduate of the College of Natural Sciences of the University of California and the Medical Department of the University of California; I had my preliminary training for admission as a physician and surgeon in San Francisco; I have been engaged in practice about twenty-three years. My practice is general. I have known the plaintiff in this case, Sidney Burleyson, since some time in the spring of 1927. He came to me as a patient at that time. He has been under my care and observation periodically from

(Testimony of William Cooper Eidenmuller.)

August, 1927, to date. I have tried to diagnose the trouble from which he is suffering. First I will medically, or technically, describe the character of the disease so that the jury may be able to understand it. It is a chronic affection of the blood vessels, namely, arteries and veins, chiefly, of the hands and feet and fore-arm and lower leg; and by lower leg I mean the lower extremities from the knees down. It apparently originates as an acute inflammation inside of the blood vessels, and ultimately results in thrombo engiitans obliterance. Now, if you would like me to give it in plain English I will. We all understand what the term "blood vessel" means. The blood vessels consist of arteries that carry blood to all parts of the body. The majority of the blood vessels in the body are necessary; some could be dispensed with and some could not. The other branch of the blood system consists of veins which carry the blood back from all parts of the body; and most of them are necessary. In this condition the blood vessels in question become inflamed and they become filled up more or less with inflammatory tissues, and due to that they cannot carry the blood to the parts that are ordinarily [25] supplied by them, that is, the arteries cannot, and if the veins are affected they cannot carry the blood back to the center of the body which has already been carried to those parts; and if enough arteries carrying blood to a part of the body are affected, filled up closely so that the blood cannot pass through them, the part that they supply is

(Testimony of William Cooper Eidenmuller.)

going to die from lack of nutrition, lack of food; when it does that we say that gangrene has set in, and that part has to be kept from the rest of the living body. The danger is it will tend to spread to the adjoining live tissues, to say nothing of the danger to the life of the patient.

In the course of my treatment of Mr. Burleyson I examined into the history, his medical history, and in the diagnosis of the disease I considered that history; also in my treatment of him. We do not know the specific cause of the disease. A great many causes have been advanced. One of the earlier causes advanced was excessive poisoning from the use of tobacco; another cause given a great deal of consideration was excessive use of alcohol; another cause was it was an incident to a disease known as syphilis; another cause was faulty diet, excessive consumption of starch and carbohydrates, producing a high-blood pressure, and in some way bringing about the local conditions that I have already spoken of. Other causes considered are heredity and racial characteristics in that the instances of the disease in a majority of cases is among people of Jewish blood. Another group of causes is the mode of life of those who are and have been afflicted, that, in the majority of cases, are among the poorer class, in the middle class, and the majority of cases have occurred in the colder countries of the world, and parts of other countries that are the coldest. [26] So that it is generally looked upon as being the result directly of infection in

(Testimony of William Cooper Eidenmuller.)

that living germs may travel to and lodge in the vessels that are affected, or that poisons that are produced by germs in other parts of the body may concentrate in those parts that are affected and produce the changes that we have already spoken of, or that chemical poisons produced by faulty food or faulty functioning of any or various of the several organs of the body produce the changes which I have described.

In my examination into the medical history of Mr. Burleyson, I considered certain conditions that he suffered from, that I looked upon as perhaps the most predisposed to leading to this condition. They were influenza, acute appendicitis, chronic tonsolitis, and the condition of the feet known as flat feet. To my knowledge none of the various causes I have mentioned that have been discussed by branches of the medical industry,—tobacco or intoxicants or syphilis, existed in Mr. Burleyson. Whatever the cause, it is my opinion that he has the disease. There is not any specific cure known.

Mr. McNAB.—Q. What will be the inevitable termination of his trouble?

A. Well, in the majority of cases they lose one or more toes, and furthermore including portions or all of the lower legs.

Mr. VAN DER ZEE.—Just a moment. I ask that that be stricken out upon the ground that the answer is not responsive. The doctor is stating as to the majority of cases. The question is, what will happen in this case.

(Testimony of William Cooper Eidenmuller.)

The COURT.—The motion to strike will be denied.

Mr. VAN DER ZEE.—Exception.

The WITNESS.—Unfortunately amputation is necessary [27] in a great majority of cases. That is about as far as I can go. In other words, I would not be at all surprised if that would be the ultimate outcome in this case. Some do avoid it, escape it, but they are in the great minority. As to whether or not he would be in a better condition at the present time if his feet were amputated than to remain in his present condition, I always leave a serious question like that up to the individual, because if they are taken off they never can be put back. I always leave a decision like that up to the patient; I cannot suffer for him and feel his pain, but in my opinion, from my observation of him since 1927, I would not be surprised if that is the ultimate outcome in his case. If they were removed he would be free from all the suffering that is caused by the condition in his feet. The thing has gone on, in my opinion, for ten years, and he has had considerable treatment, and to-day there has not been any improvement, and I really—of course, I do not like the patient to hear a thing like that, but I really do not look for much improvement.

Bearing in mind that any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation is a total disability, in my opinion he is most emphatically, most decidedly, totally

(Testimony of William Cooper Eidenmuller.)

disabled within that definition. The disease from which he is suffering is in my opinion permanent. During the period of time that he has been under my care, I have advised him to do everything in his power to promote the circulation in his feet and lower legs; I have advised him to change the position of the feet and lower legs just as frequently as he can; not to leave them in one position or at one angle of elevation more than a few minutes at a time. I believe that is one of the greatest factors that we [28] have in lightening the time that they are to keep on their feet and legs; the slightest little movement will open up practically a collapsed vessel and let a little blood through for the time being, and then after a short time the circulation seems to cease in that portion and a little further movement or a little slight variation in the angle of the elevation will start the blood going in other vessels that are affected. That man has been instructed to spend his entire time, devote his entire time to the care of the feet and legs; he is just as busy, in my opinion, as he should be, taking care of his legs and feet. I have advised him to use external heat. I have instructed him at night when he goes to bed and puts his legs in a position, vertical or horizontal, that he should not leave them that way too long; that if he is awakened by pain, to change the angle of elevation and move them, and go to the bathroom and run the hot water in the tub and bathe them, and in that way promote the circulation and bring them back more to life nor-

(Testimony of William Cooper Eidenmuller.)

mally for the time being. This restoration of circulation is accompanied by a great deal of pain; it is more or less of a constant agony all the time. Theoretically they are short, stab-like pains.

In my opinion he is in a condition to do no work, except to take care of his own feet and legs. If he does do any work beyond simply taking care of himself he may be jeopardizing the length of time he is going to keep his feet and legs or his life. Gangrene occurs in the majority of cases and amputation is the only relief. In my opinion his present trouble will continue throughout the remainder of his life. [29]

Cross-examination.

(By Mr. VAN DER ZEE.)

According to my ledger I saw Mr. Burleyson for the first time on August 22, 1927. I was called to his house, according to the ledger, as his private physician, I guess. I am reading from a copy of certain items taken out of my ledger. They are in the handwriting of Mrs. Eidenmuller. The only thing I personally recollect about this man's case is from my memory, but I wrote one report concerning his case to some branch of the Government, and I attended a hearing or conference before some Governmental body to have his disability increased in the matter. I am a general practitioner; I am not a specialist in these particular diseases; if I were I think I would starve to death. Mr. Burleyson is the only case of this particular kind I have treated, but I would like to add to that an explana-

(Testimony of William Cooper Eidenmuller.)

tion. At the same time when I was attending Mr. Burleyson for the condition that he has, I was attending another employee of the same hotel with a condition nearer to Mr. Burleyson's condition than anything else in medical annals, called "raynos," and is so similar that up to twenty-five years ago in this country they were classed under the same general head, and in making the diagnosis in this other case I was able to become enlightened considerably as to the condition that Mr. Burleyson is in, and the net result of those two diseases is about the same; in fact, the other man has since lost both feet and legs below the knees.

I prescribed for Mr. Burleyson at that time treatment that could be classed under the head of—general head of physiotherapy. I did not at any time prescribe amputation. No; I did not state my opinion to be that amputation is [30] absolutely necessary in this case; I said this morning that in a serious matter of that kind I always leave the decision to the patient. As far as amputation is concerned the operation would tend to remove from the rest of his body the affected parts, and if it did that he would no longer have that condition, and then, unless it extended, he would be free from the suffering that he is now enduring. During part of the time at least that he was under my care he was also under the care of the Government in hospitals and receiving treatment, so I was not the physician to the full extent I could have him solely in my care. I did not say that amputation was advisable; I said

(Testimony of William Cooper Eidenmuller.)

that a majority of these cases come to amputation, and further I will say that I have not advised at this time that amputation be performed.

This disease is not a result of what is known commonly as flat feet; the specific cause, as I testified this morning, is not *know,* as far as I know, and as far as the authorities know. This man has flat feet. That can be looked upon as a predisposing cause in that it would doubtless incorporate some features that are affected by this condition.

I think if he is able to take good care of his feet and legs and keep them on he ought to be considered fully employed.

Redirect Examination.

To my knowledge there is not any particular specialist in the treatment of this disease as a specialist. It is apparently rather a rare form of disease. I have studied quite a few authorities that are available on the subject. I have never met anybody in the profession who has professed [31] to be a specialist in the treatment of this particular disease. When I say that I have not thus far advised amputation I do not mean to say that amputation may not ultimately be necessary. In the event that gangrene sets in instant amputation would be absolutely necessary to save life. The other case which I described as a very similar condition has required that; the amputation of both limbs below the knees.

(Testimony of William Cooper Eidenmuller.)

Recross-examination.

(By Mr. VAN DER ZEE.)

I have stated that there are doctors who have handled a larger number of cases than I have and that by reason of that experience and also by reason of special training they know more about the treatment of this case than I do. When I first saw this man he was using double crutches. When I first saw the man he was acting as a night clerk in the Hotel Worth, and on a good many occasions when I saw him, I am not sure that it was the first time, he was sitting in a chair with his feet and legs propped up on another, with a blanket around them, and naturally I became inquisitive when I saw that thing repeatedly from time to time, and I became interested in his case. Yes, he called at my office. He walked into my office; I can recall pretty well during the entire part of 1929, I believe he had crutches, and I think in 1928, too. I cannot recall that there ever was any occasion when he walked into my office without the aid of the crutches; there might have been.

Mr. McNAB.—Your Honor, at the adjournment the [32] United States Attorney advised me for the first time of a contention that he might raise in this case; I was not advised of it before. If that contention is going to be raised I would like to call the plaintiff back and ask him a question to make the record perfectly clear on a certain subject.

(Testimony of Sidney T. Burleyson.)

The COURT.—Can you examine him where he is?

TESTIMONY OF SIDNEY T. BURLEYSON, IN HIS OWN BEHALF (RECALLED).

Mr. McNAB.—Q. Mr. Burleyson, this morning you were asked concerning making application or demand on the Veterans' Bureau for your War Risk Insurance. Did you make such a demand?

A. Yes, sir.

The WITNESS.—That was about that date that I discussed this morning concerning some other demand that was filed; that was at San Francisco. I told them I was unable to do any work and asked if I was entitled to ask for the benefits of my War Risk Insurance and they told me it was impossible to obtain it. They never changed that ruling, and that is why I brought this suit.

Cross-examination.

(By Mr. VAN DER ZEE.)

I made a demand for my War Risk Insurance payments; I asked a member of the rating board; when I say "the board" I mean the Rating Board of the Veterans' Bureau. I do not remember the names of any of those men; it was Rating Board No. 3. I did not make any written application for those payments. I never received from the Rating Board or anybody else a written statement of their denial of my claim for insurance benefits;

(Testimony of Sidney T. Burleyson.)

I asked them and they told me it was no use; I did not receive any written denial. I never received any communication, written or otherwise, [33] from the Director of the Veterans' Bureau with respect to my War Risk benefits.

Mr. McNAB.—If your Honor please, at this time we wish to introduce a document which appears to be a report or a diagnosis on the condition of Sidney Burleyson, signed by C. L. Hoy, Major in the Marine Corps, Officer in Charge, and this was made at the Presidio, San Francisco. (Reading.)

TESTIMONY OF HARRY A. PESCHON, FOR PLAINTIFF.

HARRY A. PESCHON, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am a police officer connected with the Detective Bureau in the city; in the Identification Bureau. I know the plaintiff, Mr. Burleyson. I saw him in Ward 4 at the diagnostic center in the Base Hospital at Palo Alto; I knew him to be there during the time that I was there, from the first week in January of this year to the middle of February. He was still an occupant of the hospital at the time I left; he was a bed patient. I don't know just what the doctors were doing with him, but I do know that both of his legs were in a plaster cast the entire time with the exception of the last week that I was there. He was in a surgical bed,

(Testimony of Harry A. Peschon.)
so that part of his body could be raised, and his feet were elevated. They were both in a plaster case. He did not say that he was in pain but he stayed right in bed all the time that I was there.

Cross-examination.

(By Mr. VAN DER ZEE.)

He did not tell me what he was there for or what he was being treated for. [34]

TESTIMONY OF G. H. SIMPSON, FOR PLAINTIFF.

G. H. SIMPSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am an engineer, railroad construction. I know the plaintiff Sidney Burleyson; I have known him for two and a half or three years. When I first knew him, he was night clerk at the Hotel Worth. I had occasion to observe him while he was attending to his duties there; it was during the nighttime. He kept off his feet as much as he could. He served from eleven at night until seven in the morning. During that period of time there were very few people coming and going. I did not observe his general condition with regard to his ability to get about at first, but I did so later on. I noticed he had difficulty in walking around. At that time he was not using crutches. He seemed to walk as if his feet hurt him. He did not impress

(Testimony of G. H. Simpson.)

me as a man who was able to carry on any continuous work.

Cross-examination.

(By Mr. VAN DER ZEE.)

I have not any idea how many hours a night he would work on that job. I was not working with him. I came in early in the morning and noticed him sitting in a chair with his feet propped up. I found out later the cause of it; it was due to trouble with his feet. I noticed that his arches had fallen. I looked at his feet. He had on a pair of oxfords. From the appearance down here (illustrating), it looked as though the arches had fallen. I presume he was on the job about a year. I think he was on from eleven at night to seven in the morning.

So far as I know he performed no work during the daytime. [35]

TESTIMONY OF F. W. SMITH, FOR PLAINTIFF.

F. W. SMITH, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am proprietor of the Herald Hotel. Part of the time for the last eighteen months off and on Mr. Burleyson lived at my hotel. During that time I gave him no employment whatever. During the times that he has been at the hotel I have had occasion to observe his condition. When he first

(Testimony of F. W. Smith.)

came to the hotel, I think about May of last year, he was having trouble with his feet, and was using a cane, and after he was there about two months he went down to the Palo Alto Veterans' Hospital. I know of my own knowledge that he had gone to the Base Hospital at Palo Alto. His condition was much worse when he returned. My recollection is he came back to the city after about twenty-five days or so, and then he went to the hospital again and stayed down there for some considerable time, I think. I don't remember the exact date, but four or five months; and when he came back he was much worse; he was on crutches. We naturally noticed when he came back he was around the hotel and he could hardly walk; he just used these crutches. He could not hold one position very long; we never said anything to him but he would sit down for about half an hour, and then he would get up and walk some place else, or go to his room, but he seemed to be much worse when he came back from the hospital. During the time that I observed him, he was not performing any labor of any kind whatever. He did not during any of the time he was there perform any labor, nor do anything other than care for himself. [36]

Cross-examination.

(By Mr. VAN DER ZEE.)

He was a roomer at my hotel. He first came there in May of last year and stayed until some time in July, and then went to the hospital for I

(Testimony of F. W. Smith.)

think about twenty days or so, and then came back and stayed for a very short time, and then went down to Palo Alto and stayed down there I think four or five months, and then came back to the hotel for a short time and went out to the Letterman Hospital. I was in touch with Mr. Burleyson while he was at the hospital; I was forwarding mail to him and telephoning him. I met him for the first time in May of last year, I think.

Mr. McNAB.—I should like to offer in evidence at this time a report of the physical examination of Sidney Burleyson conducted by Major Mariella, of the Letterman Hospital, bearing date March 29, 1929 (reading).

I offer in evidence, if your Honor please, the diagnosis of Doctor M. T. Maynard, at the Veterans' Bureau, concerning statements as to the condition (reading).

TESTIMONY OF J. A. BROOKS, FOR PLAINTIFF.

J. A. BROOKS, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am a cigar clerk. I live at 154 Ellis Street; I know the plaintiff Sidney Burleyson, and have known him for about seven years. I have had occasion to observe his habits, they are regular; he does not use anything that would disturb his system. I have had occasion to observe the development of his trouble. He seems to suffer pain; he is get-

(Testimony of J. A. Brooks.)

ting worse, I believe. I have seen him before and after his visits to the various hospitals which have been [36–A] described here. Before his visit to the hospital at Letterman and Palo Alto. After his return from those hospitals there did not seem to be any improvement in his condition. He seems to suffer pain. During the time I have observed him he seemed to be taking the best of care of himself, resting all that he could. I believe it has been about a year and a half since he has been engaged in any form of labor. Prior to that time he was never continuously employed at anything, to my knowledge.

Cross-examination.

(By Mr. VAN DER ZEE.)

I reside in San Francisco and have during the seven years I have known Mr. Burleyson. I believe during all of those seven years except the last he has been working outside of San Francisco. During the time he was working outside of San Francisco I did not see him at all.

Mr. McNAB.—That is plaintiff's case, if your Honor please.

Mr. VAN DER ZEE.—If your Honor please, I desire at this time to move for nonsuit upon the ground, first of all, that the disagreement with the director, which is required by the Act, has not been established.

The second ground is this, that by the evidence of the plaintiff, himself, particularly on cross-examination, it is established that he made no claim

(Testimony of A. J. Whalen.)

for physical disability until 1926, and that prior to that time, and beyond that time, up to 1928, he was practically continuously employed at various occupations.

(After argument.)

The COURT.—The motion will be denied. [37]

Mr. VAN DER ZEE.—Exception. At this time I desire to move for a directed verdict in favor of the defendant upon the grounds that all of the evidence of the plaintiff so far fails to make out a *prima facie* case, that no disagreement has been established, that the disagreement is one of the material allegations the complaint put in issue by the general denial, and that no denial of any claim for war risk insurance benefits by the director of the Veterans' Bureau has been shown by the evidence.

The COURT.—The motion for a directed verdict will be denied.

Mr. VAN DER ZEE.—Exception.

TESTIMONY OF A. J. WHALEN, FOR DEFENDANT.

A. J. WHALEN, called as a witness on behalf of the defendant, being first duly sworn, testified:

I have the Veterans' Bureau record showing the date of lapsation of the policy of the plaintiff in this case. The last premium was paid to include January, 1920, so the insurance lapsed January 31, 1920.

(Testimony of A. J. Whalen.)

Cross-examination.

(By Mr. McNAB.)

In other words, he paid for seven or eight months after his discharge from the Army; he was discharged in July, 1919, and it lapsed as of January 31, 1920.

TESTIMONY OF DR. EDWIN A. HOBBY, FOR DEFENDANT.

DOCTOR EDWIN A. HOBBY, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am a physician connected with the United States Veterans' Bureau. I am doing the general surgical and [38] orthopedic examination. Orthopedic means diseases or injuries of bones and joints. I know the plaintiff in this case, Mr. Burleyson. I have examined him at the Regional Office of the United States Veterans' Bureau, on three different occasions. The first time was December 15, 1926, when he came up for an examination on a claim for disability. I made a diagnosis at that time. He had what is commonly called flat feet. I did not give him a general examination. I examined him as to his complaint. He gave me a history of having been operated on in 1919 for appendicitis, and his tonsils, and following that operation his feet began to bother him; and soon after that he was discharged on a surgeon's certificate of disability. He said that he had complained

(Testimony of Dr. Edwin A. Hobby.)

of his feet ever since that time; he gave his history as having gonorrhea nine months previous to my examination, and his present complaint was pain in his feet, after standing or walking much. That is all the history he gave to me which pertained particularly to his feet. I found that his feet had the appearance of being congenitally broad and flat, and somewhat pronated. They were not rigid, and he was able to stand on his toes with good strength. They were not swollen at that time. Bearing in mind the diagnosis of permanent total disability with the terms of the Act which I have heard here and with which I am familiar, I would say he was not at that time totally disabled from following continuously any substantially gainful occupation. He was not permanently and totally disabled from the standpoint of following continuously a gainful occupation. There was not anything in his physical condition, from the standpoint of his feet, to prevent him from following any occupation, I do not care what. [39] The next examination was on February 27, 1928, and he gave a history at that time of having complained of his feet while in service, and having been discharged on medical survey. He said his feet began to swell in 1922, or rather, 1923, and that his toes got sore after that. His present complaint came from the arches of his feet, swelling and soreness of his toes, sometimes got sore under the anterior part of his feet, has been receiving treatment on the outside, that is, outside of the Veterans' Bureau, by private

(Testimony of Dr. Edwin A. Hobby.)

physicians probably, and in the Out-patients Department of the Veterans' Bureau since last May. This was May, 1927.

On examination, his feet were found to be congenitally broad and flat, and somewhat pronated. There was no swelling nor enlargement of joints. There were recent abrasions of the skin over the toes, as if from burns or blisters. There was a rather marked relaxation of the circulation of the feet, and the condition of which he complained was probably a circulatory one. The diagnosis I made at that time was, 1 paes planus and pronatus, bilateral, second degree marked without rigidity, but marked subjective symptoms. It meant that he had very weak feet, and they are what are commonly called flat feet, but they were not of the extreme variety, intermediate, and that there had been no structural changes in the joints which makes the feet rigid and unflexible, and that he complained greatly of them. He did have some symptoms as pain and fatigue of his feet, probably pain in his legs; his feet bothered him a good deal. I also made a note, second diagnosis, circulatory disturbance in both feet, but I was unable to determine the cause at that time. I thought that it was due to having bandaged, strapped his feet a good deal, and having set up some swelling, and abrasion. It [40] had that appearance to me at that time, but I was not sure of it, and I would not say. On the occasion of this second examination, he was not

(Testimony of Dr. Edwin A. Hobby.)

permanently and totally disabled within that definition, which I have heard.

The third was not really an examination. He came into the office on March 26, 1929, and requested treatment, hospital treatment, and we are not obliged to make an examination for a record, except in so far as to satisfy ourselves that he is in need of hospital treatment, or that we think that hospital treatment is advisable, and we make a recommendation upon that. I simply made a note he was complaining of his feet swelling, and being stiff, and cold, and I referred to the records on file in the folder which I had before me for his condition, and especially to a report from the diagnosic center, which had just come in, I think, and I noticed that his condition was the same as reported on discharge from the hospital March 1, 1929; that is, the report from the diagnosic center was the same as the report on his discharge from the hospital, and I advised his going to the hospital for further treatment. I never advised amputation in his case; that question never came up, or entered my mind at any time that I saw him. I don't know what his condition is at the present time. I would not like to say without seeing him that his condition is one that necessitates amputation, or is likely to necessitate amputation, but with regard to the time that I saw him I would say that it was not necessary at any time when I saw him.

(Testimony of Dr. Edwin A. Hobby.)

Cross-examination.

(By Mr. McNAB.)

The report by Major Hoy of the Medical Corps at [41] the Presidio, and Major Marietta, which you have introduced in evidence here, in which they both diagnosed his trouble as this disease which has been described as thrombus angiitis obliterans, I neither agree nor disagree with that diagnosis, because I do not know. I would not want to say without an examination. I am perfectly willing to examine him now and say. I am quite satisfied that at the time I made the two or three examinations of him, he was not a victim of that disease at that time.

I have seen quite a few cases of thrombus angiitis obliterans that have come to the Veterans' Bureau and otherwise. It does not occur with great frequency. I expect I have seen twenty or thirty cases since I have been connected with the Bureau. During that period I have had under my observation several thousand cases; I have made several thousand examinations in the last eight years for the Veterans' Bureau, and out of those several thousand I presume I have had no more than somewhere about twenty who have been afflicted with thrombus angiitis obliterans. They are a very negligible percentage of the diseases. It is a general physical disease. It is progressive as a rule. It is a circulatory disease, an infectious disease of the blood vessels, impairing the circulation of the

(Testimony of Dr. Edwin A. Hobby.)

limbs. I could not say that I have known of a case of thrombus angiitis obliterans which when once fixed in the human form, has been cured. I have seen some cases that have been so-called, that have either become arrested or where a mistake in diagnosis has been made. I don't think that quiet, relaxation, and relief from pressure of the limbs would make any difference in the arresting of the disease. I cannot name a single case in my entire experience where any victim of that disease improved, or was cured while continuing [42] physical or other labor, nor any other way. I do not think it would make any difference if a man with thrombus angiitis obliterans went out here and worked with a pick and shovel.

After my examination I referred him to the Letterman Hospital for treatment. I do not remember anything about my asking him what was the matter with him and he said he did not know, at my examination, and my stating I really did not know what was the matter with him.

Mr. McNAB.—Q. Didn't you ask Mr. Burleyson what he thought was the matter with him, and didn't he reply he did not know?

A. Not that I know of.

Mr. WRIGHT.—Q. Didn't Mr. Burleyson ask that question of you, and didn't you tell him you did not know?

Mr. VAN DER ZEE.—Objected to as assuming something not in evidence, not proper cross-examination.

(Testimony of Dr. Edwin A. Hobby.)

Mr. WRIGHT.—I am asking him on cross-examination, testing his qualifications.

The COURT.—The objection will be overruled, and an exeeption.

The WITNESS.—A. I have no recollection of Mr. Burleyson asking me any such question, and I have no recollection that he did ask me such a question, or any reply that I made to him.

I don't know that I saw Mr. Burleyson before March 27, 1928; I saw him on March 26, 1929, on February 27, 1928, and December 15, 1926. Referring to February 27, 1928, I have no recollection of any conversation with him; I must have had some conversation, because I got his complaint at that time, and I put down all the complaint that he made; I do not recall recommending to him that he should go to Letterman Hospital. February 27, 1928, I made an examination [43] for compensation purposes, only, and the question did not come up as to hospitalization. I would say that I did not make any such statement as that to him.

TESTIMONY OF JOSEPH S. HART, FOR DEFENDANT.

JOSEPH S. HART, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am employed by the United States Veterans' Bureau as a physician; I have been with the Veterans' Bureau since the 21st of February, 1924.

(Testimony of Joseph S. Hart.)

I am a general practitioner. I made one examination of Sidney Burleyson, the plaintiff in this case. I have a record of my examination. May I use it? I examined him on February 27, 1928. I made a diagnosis at that time. Mr. Burleyson gave me a medical history of the case at that time. I have that history scattered through the examination. I also have it in answer to the details of claimant's disability since his service, and his present complaint. It is quite lengthy. Claimant's statement, only hospitalization since discharged from service was Southern Pacific Hospital, San Francisco, California, for operation on my eye, right, about February, 1923, operated for cataract on my right eye, remained in hospital for eye for six weeks. About three months after discharge from service to work as storeman, Mare Island Navy Yard, under civil service appointment; remained there for about one year, then to work for Southern Pacific Railroad Company as cashier in Dining-car, Hotel, and Restaurant Department, for five or six months—I beg your pardon—for nine months; then did nothing much for five or six months, then to Del Monte Hotel, in storeroom, for three months, then back after about two and a half months to Southern Pacific [44] Railroad Company, dining service, with lay-off several times until September 3, 1923, when he quit; after two months to work as assistant receiving clerk for the Emporium, San Francisco, until March, 1924, then to Fox Hotel, as hotel clerk, at Taft, California, for about eighteen months;

(Testimony of Joseph S. Hart.)

about June 15, 1926; then laid off until July 25, 1926, when to work at Lake Tahoe, as hotel clerk, until October 1, 1926, when season closed. Then about November 1, 1926, to Whitcomb Hotel, San Francisco, for one month, then laid off until about 8th of January, 1927, when to work at Granada Hotel, San Francisco, as night clerk, until about the 18th day of February, 1927, then laid off until about the 2d of April, 1927, then to Worth Hotel as night clerk, and have been employed there ever since—still employed as night clerk at Hotel Worth, San Francisco; no accident nor sickness since discharge from service. In the body of my report there is reference to some other sickness in between, which is not *give* at this time.

Present complaint: It's my arches, and also a breaking out on my toes—arches are broke clear down; it's the pain right under here, in the arches, both feet the same, right, directly under the ankle, right straight down, you might say; on the toes, as my feet swell, swell whenever stand on them for any length of time, its eczema. The eczema has been since some time about 1923, last part of 1923. That's only ailment that I have, just my feet. Then follows the report of physical examination—shall I read that?

On physical examination, I have the following record: Fairly erect, well developed generally, very muscular arms, more than well nourished. Color appears to [45] be excellent; but full blood report, including blood sugar determination will be

(Testimony of Joseph S. Hart.)

attached when received. Skin not remarkable; has an old well-healed appendectomy scar, three-quarters inch diameter, superficial scar in the side, upper, one-third left leg; except that over great toe and next toe left foot, and over second and third toes right foot are two small areas of what appear to be recent abrasions, at edge of area on toe left, next great toe is some of the superficial layer of skin which looks like there had been a definite blister here which had probably been chafed open, I do not find anything here on which to say eczema; these areas look to me like abrasions rather than skin disease. Claimant has tight bandage two and half or three inches around waist of each foot. He says that the bandages are because of fallen arches. He says the only skin involvement is on the toes; the areas of recent abrasions are small and all on the dorsal surface, none elsewhere. I am not requesting claimant to remove the bandages mentioned above in view of his story, and in view of the fact that his feet will be later examined and reported upon to-day by orthopedist; from what I see, especially in view of practically no pronation being present, and weight of individual, I am inclined to consider as probably congenital low arch feet rather than broken arches; but as I have not taken bands off, see orthopedist report of condition. Throat somewhat hyperemic, tonsils appear to have been removed. Teeth, fair condition, some repair, will be referred to dentist. Tongue not remarkable, very slightly coated. Lungs apparently

(Testimony of Joseph S. Hart.)

perfectly normal, no abnormalities detected by me, but because of general order will be referred to T. B. specialist for his examination, his report will be on page 3. Heart [46] action is of good strength, regular, no abnormal sounds or other abnormalities detected; no thrill. A. C. D. appears to be within normal limits. When sent to X-ray for chest, heart will also be included, so see X-ray for definite measurements. Claimant cannot exercise by jumping because of feet; he was, therefore, requested to exercise by stooping, hands above head to the floor, fifty times; this he did, and immediately after the heart rate was 96 G. S. R.; there was no evidence of nor any complaint of any distress, no cyanesis, no dispnea, no abnormalities of any kind detected, either when upright or recumbent. After exercising one minute heart rate 78 G. S. R.; after one and a half minutes rate is at pre-exercise rate of 72. Abdomen soft, very considerable fat, no masses made out, no distention, no tympanitis, no rumbling, no tenderness nor sensitiveness from palpation, no spasm, no rigidity; there is an old, well-healed surgical scar (appendectomy 1919), no hernea, no hemorrhoids.

Genitalia; there is a well-defined scar, old, on fraenum; the left testacle is also somewhat larger than right, and the left epididymus is somewhat indurated; claimant admits gonorrhea lasting about three months in 1926; denies ever any other venereal disease. Extremities, see orthopedic report; from my examination slight abrasions tops of two toes

(Testimony of Joseph S. Hart.)

each foot; apparently comparatively recent; no eczema found; possibly congenital flat feet. Claimant is wearing tight bandages around waist of both feet; there is practically no pronation here. Nervous system, referred to N. P. examination. No Romberg. No tremers. Pupils round, equal, react to L. not tried for D. None equal. Right is apparently definitely hyperactive; *tende* achilles apparently right is a little more active than left. Superficial [47] glands not remarkable. No edema, no ascites, no jaundice. At the time of my examination it is my opinion that the plaintiff was able to follow continuously any substantially gainful occupation; as far as I could see any number of occupations.

Cross-examination.

(By Mr. McNAB.)

I found no reason why he should not take any of any number of occupations, running an elevator. From what there is here, yes, I would be willing to ride to the top of the Russ Building with him, in his condition, operating the elevator and standing on his feet. I could not say definitely how long that examination took; I should imagine it probably took up a matter of at least an hour. I do not recall seeing him before, nor so far as I am aware have I ever seen him since. My entire knowledge of his condition is based upon this one examination and what I have heard in the courtroom of his condition. I never at any time saw him perform or attempt to perform any kind of labor. I am

(Testimony of Joseph S. Hart.)

simply gaging it on my examination during this period of time. I have no way of knowing that if he were to stand upon his feet and engage in some physical exercise for six hours his feet would swell and become painful so that he could not any longer stand on his feet. On the basis of what I found, and from what I have heard at this particular time, I am stating that I do not see any reason why he should not keep on his feet; there is nothing to believe contrary to the evidence, that he was available for almost any work. I am not an orthopedist. I referred him to an orthopedist for an examination of his feet. I did not make any examination of the joints of his feet. I did not even take the bandages [48] off his feet. I did not make an examination of the joints of his feet, because the Government has men who are specialists along those certain lines. We have specialists available, and we refer every case to specialists. I saw this man from the general medical examiner's standpoint, and not a specialist. I do not pretend to be an orthopedist, skilled in the examination of the feet. I sent him to the orthopedist because of the fact that *is* claim involved the arches. As there are arch specialists there, it is not my function to do that. I do not pretend to be an arch specialist. I made no attempt to make the orthopedic specialist's examination. I was considering the whole body, and referred him to the specialist for that. I did not ask him to remove the bandages from his feet, because I referred him to the orthopedist.

(Testimony of Joseph S. Hart.)

The nature and extent of the falling and breaking of the arches, I make an entry that there is practically no pronation here. I did not conduct any examination by measurement and by scale of the pressure of his feet in that condition; I made no attempt to. I tried to go through the general examination of heart and lungs, and skin, as a general practitioner would. He came complaining about his feet. I made an examination of his heart. I did not find it here that he complained of his lungs. I made no examination of his feet but I made an examination of his lungs. I went over his body and found that he had had a cataract removed, had an operation for appendicitis, and had an operation for the removal of the tonsils, but he did not complain of any of those things, but the Government sent him to a general medical examiner for examination, and for the specialist's examination in addition. I referred him to somebody else for his feet, because it is not my function to examine him for that. [49]

He came to me complaining of the condition of his feet, and I made such an examination as that I have referred to. I did not attempt to diagnose the trouble in his feet except as to some abrasions and as to the skin condition. There had been something there on the surface of the toe some abrasion. He came to me with a complaint concerning his feet and I referred him to somebody that was thought to be a specialist qualified to pass on that subject. There are very few who are familiar with the

(Testimony of Joseph S. Hart.)

disease known to the medical profession as thrombus angiitis obliterans. I am not familiar with its treatment. I did not make any such diagnosis. I am not qualified to make a diagnosis of that disease as a specialist, I am not a specialist. I examined his feet enough to arrive at the conclusion that he could perform satisfactorily in a great number of occupations. I pointed out the fact that the condition of the skin was due to the tight bandaging. I do not believe I asked him whether these bandages were being applied under the direction of a surgeon, I don't know, I could not say.

Redirect Examination.

(By Mr. VAN DER ZEE.)

As a general practitioner I was able to observe the condition of his feet, although as a matter of precaution I recommended an examination by a specialist on feet.

(By Mr. McNAB.)

I absolutely disagree with the application of bandages around the feet. I don't know who applied them and that would make no difference, whatever. [50]

TESTIMONY OF P. J. MANGIN, FOR DEFENDANT.

P. J. MANGIN, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am the examining physician for the Southern Pacific Railroad Company. Referring to the docu-

(Testimony of P. J. Mangin.)

ment which you show me, that is a photostatic copy of my signature. That is a copy of my signature to a copy of a report of a physical examination made by me of Sidney T. Burleyson. The date of that examination was July 6, 1926. Upon that examination I found that the heart and lungs are normal. In answer to the question of whether he had been injured and hurt, the reply was negative. In answer to the question of what illness he might have had, he said he had pneumonia, measles, mumps, and appendicitis in 1920. That is the entire history of his condition at that time. He was rejected on this occasion for employment by the Southern Pacific Company. There was an inflammation of the urethral orifice. There was a discharge of the urethral; I was not able to make any positive diagnosis, so I asked him to return in a few days, which would enable me to determine whether it was a simple affair, or not. He did not return, and, consequently his application was rejected. The reason he was rejected was because he failed to return. Basing my opinion upon the record which I have just referred to, bearing in mind this definition of total and permanent, as that disability which would prevent a man from following continuously any substantially gainful occupation, there was nothing that would have prevented me from accepting him at that time.

Cross-examination.

This examination probably consumed about fif-

(Testimony of P. J. Mangin.)

teen minutes. I presume he was there looking for a job, trying [51] to get employment. It was not the purpose that he call my attention to defects, or troubles. Whatever I found out in the way of troubles I found by extracting from him or by making a physical examination. I did not make any special examination of his feet. There was no examination made of his feet. It was generally restricted to his heart, lungs, the most important elements for the form of employment which our company might take him. Of course his gait was noticable when he walked in the room, but there was nothing to call my attention to any defect in his limbs in that way. He was not looking for a job from me but that was his purpose in being examined, he was an applicant for employment by the railroad. I have never seen him since. I do not know a thing about his condition at the present time.

TESTIMONY OF GEORGE R. CARSON, FOR DEFENDANT.

GEORGE R. CARSON, called as a witness on behalf of the defendant, being first duly sworn, testified:

The photostatic copy of the report you show me, that is my signature upon it. That is a report technically called by my company "Physical test record," upon the occasion of the application of Sidney T. Burleyson for employment and it indicates that I made a physical examination of him

(Testimony of George R. Carson.)

on August 23, 1920. He was applying for a position as cashier. I made a physical examination of him at that time. I examined the sight, first, which was found normal, and then we make a physical examination; it is rather a test, a kind of an inspection, we take the pulse, and then we ask him questions about his past sicknesses. We invariably ask "What past sicknesses have you had, or disabilities?"—so that we can record them here. You see, here, he says [52] appendicitis, and tonsils removed. There is nothing said here with reference to his feet. We ask that question, has he any present form of disability to hands, arms, feet, or legs? On the question as to his feet, I don't know that he gave me the answer "No." I put "No." He was present at the time and I was examining him at the time.

Cross-examination.

(By Mr. McNAB.)

He did not read that detailed document. This examination is rather an inspection, it is not an extensive examination. It requires just a few minutes. It is quite different from the examination which I would accord to a patient coming to me so as to be informed as to the condition of his health. There are no blood tests or minute examinations. He was not stripped, we make a practice of raising the clothes and lowering the pants. He was there for the purpose of being inspected, because he was an applicant for some kind of employment. He was not there complaining of trouble.

(Testimony of George R. Carson.)

Redirect Examination.

I did not hear the definition given here of permanent total disability. Assuming this definition of total and permanent disability as a condition where a man cannot follow continuously any substantially gainful occupation, in my opinion he was able to perform different duties at that time; I accepted him for the position; otherwise I would not have accepted him. Oh, yes, he must have walked into my office. [53]

Recross-examination.

(By Mr. McNAB.)

I never was advised that later, after being employed, he was compelled to discontinue his duties because he was unable to remain on his feet; I don't even know he was employed.

TESTIMONY OF E. E. RYDER, FOR DEFENDANT.

E. E. RYDER, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am chief clerk, manager of Dining-car Department, Southern Pacific Company. In that capacity, I have charge of the personal records of the employees in that department. I know Mr. Burleyson, the plaintiff in this case. I have a record of his employment by the Southern Pacific Company between 1920 and 1923. He was first employed on August 25, 1920, as cashier, and retired on Septem-

(Testimony of E. E. Ryder.)

ber 6, 1920, re-employed September 14, 1920, and granted a leave of absence on June 22, 1921; he was re-employed on August 16, 1922, and released on November 1, 1922, and returned to duty on November 19, 1922, granted leave of absence February 16, 1923, returned to duty on March 8, 1923, laid off on May 20, 1923, and returned on June 3, 1923, and finally resigned on September 2, 1923. The first employment began on August 25, 1920, as cashier. That continued until June 22, 1921. The first job was about eleven days. This is a record of the Southern Pacific Dining-car and Hotel Service. It is made under my supervision. There were several different reasons given by the plaintiff for discontinuing that work; the first time he left the job was because it was a temporary [54] position; the second time he said that the weather was too hot, and he wished to be transferred to a cooler place; the third time it was another temporary position; the next time he had to go to the hospital for an operation on his eye; the next time it was a temporary position. The last time was because the country was too hot, and he was tired. The records do not show the amount of salary he was paid during that entire employment. The record does indicate how many days he spent upon those different jobs. The days of service are just as I have given them, I do not have the exact days. There service is intermittent, in and out, as he moved from one place to another, and laid off, and returned to duty. The only leave of absence indicated by the

(Testimony of E. E. Ryder.)

record by reason of illness is the eye operation that I have given.

Cross-examination.

(By Mr. McNAB.)

I don't know anything about the causes of his laying off and leaves of absence except what was reported to me. I did not talk to Mr. Burleyson himself about it, personally. As far as I know he might have laid off because of pain in his feet, or some other trouble. I am merely testifying from an official record that was handed in to me by some of my subordinates. It does not disclose an unusual number of absences and leaves of absence during employment, only once of his own accord. They were all short periods between re-employment, with one exception. I have given them to you.

Redirect Examination.

To a considerable extent those positions in their very nature, are temporary; we move them from one point to [55] another as they may be required.

TESTIMONY OF MISS M. GOUGH, FOR DEFENDANT.

MISS M. GOUGH, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am in charge of the personnel records of the Emporium in this city. I have those records with me; I have the personal record of Mr. Sidney Bur-

(Testimony of Miss M. Gough.)

leyson, covering his employment during 1923 and 1924. His first employment by the Emporium was on September 21, 1923. The Emporium requires a physical examination before they go on what we call our regular roll. Mr. Burleyson was on our regular roll. He was a clerk in our receiving room. At that time he was on at $80.00 a month, but later his salary was $85.00. So far as I know he worked continuously at his position. The entire extent of his employment was from September 21, 1923, until May 16, 1924.

Cross-examination.

(By Mr. McNAB.)

There are no absences recorded. I don't know what hours he kept. I don't know anything about his physical condition when he was there. I don't know whether he was suffering or not. There would be a notation of it if he asked for leaves of absence and we have not any. I am merely testifying from records in my office. They show that his employment terminated on May 16, 1924. He resigned for a better position. I don't know where he went, or what position he went to. According to him it was a better position. I am only talking from the records, I don't know as a matter of fact that he went to any employment, but he resigned to go. [56]

Redirect Examination.

My records show, though, that it was a better position.

TESTIMONY OF A. L. LESSMAN, FOR DEFENDANT.

A. L. LESSMAN, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am a director of Heald's Business College. I do not personally have charge of the attendance records of students at Heald's College, but they are kept under my supervision. I have a record of S. Burleyson. I do not know if that is the plaintiff in this case.

Mr. McNAB.—What is the period of time that you claim he was there?

Mr. VAN DER ZEE.—January 23 to May 17, 1924.

Mr. McNAB.—He says he went to Heald's during that time.

Mr. VAN DER ZEE.—Q. Will you just state the attendance record of S. Burleyson, the plaintiff in this case, during that time?

A. Well, he was regular in his attendance in the evening school. He missed six sessions of school, all together, during that period.

Cross-examination.

(By Mr. McNAB.)

He was there from January 23 to May 17, something less than four months; he went three times a week, I am quite sure of that. He went Monday, Wednesday and Friday. In that period of something less than four months he was absent for six

(Testimony of A. L. Lessman.)

sessions, I don't know for what reason. I did not observe him in the schoolroom particularly. Most of our students are seated; all of their studies are [57] conducted there, seated either on a chair or a stool.

TESTIMONY OF JOHN STEVENS, FOR DEFENDANT.

JOHN STEVENS, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am an accountant at Tahoe Tavern. I was at that position in July, 1926; I know the plaintiff Sidney T. Burleyson; he was employed at Tahoe Tavern from June, continuously for about three months; he worked continuously, and his work was entirely satisfactory. His salary was $125.00 a month and found. He was what you might call a front desk clerk; by that I mean that he passed keys out, sorted mail, and gave general information at the desk. I observed him practically daily during the time of that employment; he never complained to me of any disability or pain or make any complaint about his feet.

Cross-examination.

(By Mr. McNAB.)

Doctor Guy Wallace was the house physician at the hotel there; this was in June, 1926, June to October, 1926. To my knowledge Doctor Wallace

(Testimony of John Stevens.)

did not examine him while he was there; I don't know whether he did or not.

Mr. McNAB.—You don't know whether Doctor Wallace made a report to the Government as to his feet, do you?

Mr. VAN DER ZEE.—I object to that as not proper cross-examination.

Mr. McNAB.—Q. Do you know whether Dr. Guy Wallace conducted an examination there with respect to his feet?

Mr. VAN DER ZEE.—The same objection.

The COURT.—The objection will be overruled. [58]

Mr. VAN DER ZEE.—Exception.

The WITNESS.—A. If he had made any examination for our insurance it would have come to my hands, and I received no such report. I don't know whether or not Doctor Wallace made a physical examination of him. Doctor Wallace was stationed there at the hotel and if there were any illness in the house it was his business to make examination.

Mr. McNAB.—I should like to offer in evidence from the Government files the two examinations by Doctor Wallace of this man.

Mr. VAN DER ZEE.—No *object.*

TESTIMONY OF F. PARRY, FOR DEFENDANT.

F. PARRY, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am the auditor of the Whitcomb Hotel and in that capacity I have charge of the personal records of the employees. I have the record of employment of Sidney T. Burleyson; his first employment was October 20, 1926, as front clerk. He ended that employment on December 5, 1926. Our records show no reason given for the termination of that employment.

Cross-examination.

(By Mr. McNAB.)

My records do not show whether he quit of his own accord or not. My superior is Mr. Drury, one of the owners of the hotel. I never talked to him about this man's condition. I don't know that Mr. Drury was very kind to him. I know nothing whatever personally. He was there [59] all together just about five weeks. I have no indication about the termination of his employment of any nature. My records do not indicate that he terminated his employment of his own accord.

TESTIMONY OF MRS. GEORGIA S. MILLER, FOR DEFENDANT.

Mrs. GEORGIA S. MILLER, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am living at the Warrington Apartments. In 1927 I had charge of the Worth Hotel in San Francisco, and at that time I employed the plaintiff in this case, Sidney T. Burleyson, as a night clerk at $125.00 a month. I have the records with me of the hotel showing the period of his employment. Referring to the records, he went to work, I think, about the 3d of April. I have it down here the 3d of April, 1927. He continued that employment until August 15, 1928. When he came to work there I interviewed him personally. He made no complaint about the condition of his feet. I never heard him complain about his feet, but about the 1st of January, 1928, he complained of ill health, but I don't remember that he ever told me that it was his feet. He did his work satisfactorily. I think there were one or two occasions when he was away for a few days. He worked for me for a period of over a year. He left me to go to the hospital for treatment, he told me.

Cross-examination.

(By Mr. McNAB.)

His work was night work; he came on at eleven o'clock and left at seven. During that period of the

(Testimony of Mrs. Georgia S. Miller.)

night of course necessarily there are very few people coming and going. During that period there was no reason why he could [60] not have been seated in a chair in the office. I never questioned it, because there is no reason why he could not. There was no reason for him to be around on his feet, at all. I knew of his ill health; I *felt* very highly of him. When he left it was to go to the Government Hospital for treatment. He was not much of a man to complain. I think on two occasions he had to hire another clerk in his place on account of illness. During those occasions he hired some other clerk and went away to get relief; and there were two occasions when it was necessary for him to apply for relief and finally went to the hospital to have treatment.

TESTIMONY OF SIDNEY T. BURLEYSON, IN HIS OWN BEHALF (RECALLED IN REBUTTAL).

SIDNEY T. BURLEYSON, the plaintiff, recalled on rebuttal:

I heard the testimony of Dr. Hobby on the stand some few minutes ago. About two or three days after I went to him for examination, in February, 1929, I went to the hospital. He sent me to the orthopedist. Well, he asked me what was the matter, on the occasion of that examination, so I asked him—I said, "You are the doctor." I then asked him whether or not he could tell me what was the

(Testimony of Sidney T. Burleyson.)

matter with me. He turned around and started to juggle some papers and did not answer me. He never told me what was the matter with me. He did not make an examination of my feet, not since then.

Cross-examination.

(By Mr. VAN DER ZEE.)

He had made an examination of my feet prior to that date. At the time he examined me there were no bandages on my feet. He sent me to Letterman General Hospital. He did not tell me as to the length of treatment that I was to [61] undergo. I stayed in the hospital about four months. I requested to be released from the hospital. I did not see any change at all in my suffering after remaining in the hospital; I came out on crutches; when I went in I could go with a cane. I used crutches for the first time right after they took those bandages off my feet at Palo Alto. It was in the latter part of February, 1929.

While I was in the Base Hospital I was in plaster cases. It was painful; I had to have them taken off, they got so painful.

Mr. VAN DER ZEE.—I desire at this time to renew my motion for a directed verdict.

Mr. McNAB.—I will stipulate that you have renewed it.

Mr. VAN DER ZEE.—I desire to renew it formally upon the following grounds, that the evidence in this case, both of the plaintiff and the Govern-

ment, shows conclusively that the allegations of the complaint have not been established, in that plaintiff has been shown to have had continuous employment on several different jobs since the date of the lapsation of his policy; there is no evidence, whatever, in the record by plaintiff or anyone else that any condition of permanent and total disability existed during the period from 1919 to 1926, and as to the period from 1926 to date, there is shown only a partial disability, due to so-called flat feet; and upon all of the grounds I renew my motion at this time for a directed verdict in favor of the Government. I would like to add to my motion for a directed verdict the further ground that the disagreement which is required as a prerequisite to a suit has not been shown. [62]

The COURT.—At this time the Court will deny the motion for a directed verdict. The Court will, however, reserve the right, if for any reason the Court changes its mind between now and to-morrow morning at ten o'clock, to set aside the present ruling and reconsider the matter.

Mr. VAN DER ZEE.—Might I ask an exception to your Honor's ruling?

The COURT.—Yes.

(An adjornment was here taken until to-morrow, October 18, 1929, at ten o'clock A. M.)

Mr. VAN DER ZEE.—Before the argument is proceeded with I would like to make an additional motion in addition to the motion for a directed verdict, that this case be dismissed for want of

jurisdiction, the ground of the want of jurisdiction consisting in a failure of the evidence, both of plaintiff and defendant, to establish that there has been any disagreement between plaintiff and defendant as to the claim set forth in the complaint, or that there has been any denial of a claim of plaintiff for war risk insurance benefits by the Director of the Bureau of War Risk Insurance, or by the Veterans' Bureau.

The COURT.—The motion for a directed verdict will be denied.

Mr. VAN DER ZEE.—An exception in each case, if your Honor please.

The COURT.—The exception will be noted.

(Thereupon counsel proceeded to argue the case, at the conclusion of which the Court charged the jury as follows:) [63]

CHARGE TO THE JURY.

The COURT (Orally).—Gentlemen of the Jury: I will now instruct you with respect to the law of the case. Preliminary to the general instructions which I will read you are advised that you are the sole judges of the testimony, and the weight and credibility of witnesses; the law, however, you are to apply to the testimony, as given you by the Court.

Counsel upon both sides have argued the case. You are advised that arguments of counsel otherwise than as they may be of advantage to you in calling your attention to the evidence, are not to be given any further consideration. They are of assistance in weighing the testimony, and calling

to your attention important phases of the case. The same may be said of statements by the Court during the progress of the trial. I desire to particularly call your attention to certain rulings of the Court with respect to motions for an instructed verdict, or motions for a nonsuit. In those cases, the Court feels that the matter is a question of law. The Court at no time reviews or weighs the testimony or determines conflicts in testimony. Matters of conflict in testimony are solely for the jury, and as I said before, the matter of determining the credibility of witnesses is solely a matter for the jury.

In determining the credibility of witnesses, you have a right to consider their demeanor upon the witness-stand, their interest, if any, in the result of the case, and all of the inducements, with which you, as ordinary individuals, are impressed, governing persons in testifying with respect to the subject matter involved in the action. [64]

This case is now to be submitted to you for your decision as to whether plaintiff is entitled to recover on his complaint against the defendant. In deciding this question, you will determine, first, from the evidence, what the facts are, and then apply the facts as you find them, to the law as given you by the Court, and in that way reach a conclusion.

It is your duty to find what the facts are; the Court's duty to instruct you what the law is; and it is your further duty, according to your oaths, to find a verdict solely upon the facts as you find them, and upon the law as given you by the Court.

The subject matter of this suit is a claim upon a

contract of War Risk Insurance, and the action, itself, is for the sum of $57.50 per month for each and every month, beginning July 10, 1919, and continuing thereafter so long as the plaintiff lives and continues to suffer his alleged permanent and total disability.

The claim for these payments is based upon a contract or policy of insurance issued by the Government to the plaintiff, while the plaintiff was in the service of the United States Marine Corps.

We may safely simplify the case by accepting as uncontroverted the following facts: That plaintiff, on July 30, 1918, was accepted for service in the United States Marine Corps, where he served as a private during the World War; that he was honorably discharged from such service on July 10, 1919; that while in the United States Marine Corps he contracted for and was granted a policy of insurance which is here sued upon in the amount of $10,000 payable in the event he became permanently and totally disabled [65] while the policy was in force, in the amount of $57.50 per month. This policy of insurance was a contract. The plaintiff's part of the contract was that he pay the monthly premiums thereon; in consideration of such payments, the defendant, the United States, agreed to pay the monthly insurance installments if he should suffer permanent and total disability during the life of the policy, in the amount of $57.50 per month. The plaintiff paid all of the premiums due on the insurance up to July 10, 1919, the time of his discharge, and thereafter he continued to pay

the premiums for six months, or thereabouts, and the insurance was in force up to and including January 31, 1920. The plaintiff contends that before his policy lapsed by reason of nonpayment of the premiums, he became permanently and totally disabled, and that, therefore, by reason of such permanent and total disability, his insurance matured and he was not bound to pay any more premiums. The defendant says that this is not true. It contends that the plaintiff was not permanently and totally disabled at the time his insurance lapsed.

The issue in this case is not complicated. Is the plaintiff, Sidney T. Burleyson, permanently and totally disabled, and, if so, upon what date did he become permanently and totally disabled? If at any time, for any reason, he has become permanently and totally disabled while the policy was in force, then his policy matured and he was not required to make any further payments of premiums. You will, therefore, determine the fact, of which you are the sole judges, whether there was a disability or impairment of mind or body which rendered it impossible for him to follow continuously any substantially gainful occupation while the policy was in force. [66]

I charge you that permanent and total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation.

Total disability shall be deemed to be permanent whenever it is founded upon conditions which

render it reasonably certain that it will continue throughout the life of the person suffering from it.

The words "total" and "permanent" as applied to disability do not necessarily imply an incapacity to do any work at all, or that a person must be bedfast or bedridden. The ability to work or apply oneself spasmodically or intermittently for short periods of time does not meet the requirements, the intendment being that the injured party shall be able to adapt himself to some occupation, or pursuit, or employment, every part of which employment he can discharge, that will bring him continuous, gainful results—something that will be dependable for earning a livelihood. It is enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation.

The word "continuously," as used in these instructions means without interruption, unbrokenly. However, it is to be taken in its ordinary, reasonable significance, as that word would be applied to employment in the business world, generally; it does not mean that a person must be able to be employed every hour, or every hour of even every working day. It does imply ability to compete with men of sound mind and body, and average attainments under the usual conditions of life.

If you find from the evidence that the plaintiff has had sufficient mental and physical capacity to earn a substantially [67] gainful living in any line of occupation whatever, you should find for the defendant.

The plaintiff is not entitled to recover merely upon proof that he is unable to follow his pre-war occupation.

To recover in this case, it is not enough for plaintiff to prove that he is totally disabled to hold a particular class of employment, but he must prove that he acquired, during the period that his insurance was in force, a continuous disability which totally disabled him from earning a continuous and substantially gainful wage from any kind of work, and that this disability is founded on conditions that render it reasonably certain that it will continue during the remainder of his life.

I charge you that unless you find from the evidence that plaintiff became totally and permanently disabled during the life of said policy, your verdict should be for the defendant.

If you find that plaintiff was not totally and permanently disabled at the time that his policy lapsed, but that he became so disabled at some later date, then your verdict should likewise be for the defendant.

Section 200 of the World War Veterans' Act, reads in part as follows:

> "That for the purpose of this Act, every member employed in the active service who was discharged prior to July 2, 1921, shall be conclusively held and taken to have been in sound condition when examined, accepted and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States

at the time of or prior to inception of active service, to the extent of which any such defect, disorder, or infirmity was so made of record." [68]

You may consider the fact of any employment which the plaintiff may have engaged in since his discharge from the Marine Corps, the nature of such employment, if any, the amount of salary received, whether or not the plaintiff gave satisfaction in such employment, and whether or not plaintiff was in fit physical condition to discharge his duties under such employment, in determining the extent and the date of occurrence of the plaintiff's disability, if any.

As permanency of any condition here, total disability, involves the element of time, the event of its continuance, during the passage of time is competent evidence to be considered with the other facts in the case.

The Court instructs you that the law does not penalize any man for making sincere efforts to overcome his physical or mental disabilities; therefore, if you believe from the evidence that although the plaintiff did attempt to work, and that he was only able spasmodically to do such work through heroic efforts on his part, or to the detriment of his health, you may consider such circumstances as evidence that the plaintiff was unable to follow continuously any substantially gainful occupation.

In civil cases the affirmative of the issue must be proven; the affirmative here is upon the plaintiff,

upon the plaintiff, therefore, rests the burden of proof.

You are the exclusive judges of the weight and sufficiency of the evidence.

I charge you that the burden is upon the plaintiff to establish that he was permanently and totally disabled upon the date that his insurance lapsed by reason of nonpayment of the premium. [69]

If evidence is contradictory, your decision must be in accordance with the preponderance thereof. When this cannot be accomplished, and the evidence is so equally balanced in weight and quality that the scales of truth hang even, your verdict should be for the defendant.

I charge you, therefore, that before any juror is warranted, under his oath, to assent to a verdict in favor of plaintiff, he must feel satisfied that the plaintiff's case has been established by a preponderance of evidence.

The term "preponderance of evidence" is not a mere figure of speech, nor is it to be lightly looked upon by a jury. It is a substantial right, given by law, that you cannot render a verdict against the defendant unless the plaintiff has established his or her case by a preponderance of evidence.

You are not bound to decide in conformity with the declarations of any number of witnesses who do not produce conviction in your minds, against a less number, or against evidence which satisfies your minds.

Motives of sympathy for the plaintiff, because of his present physical condition, however serious or

unfortunate it may be, are not to be considered by you in any degree in arriving at your verdict in this case.

Likewise, the fact that the plaintiff may have rendered patriotic service to our country during the late world war, is not to be considered by you in any respect in arriving at your verdict in this case.

Your verdict must be unanimous.

Two forms of verdict will be submitted to you. You are instructed that if you find that the plaintiff is totally and permanently disabled, that you will determine what [70] date the plaintiff first became totally and permanently disabled. And in this connection you are instructed that if you find that such disability occurred later than January 31, 1920, your verdict should be for the defendant. The complaint in this case alleges a disability existing from July 10, 1919. If you find for the plaintiff in the case, it will be necessary for you to determine some date between July 10, 1919, and January 31, 1920, at which such disability occurred. Otherwise, as I said before, your verdict should be for the defendant.

The two forms of verdict submitted to you will substantially be in the following form:

> "We, the jury in the above-entitled cause, find for the plaintiff, Sidney T. Burleyson, and fix the date of his total or permanent disability from following continuously any substantially gainful occupation from ———."

And, as I said before, if you find for the plaintiff, you will fix the date between July 10, 1919, and January 31, 1920, inclusive.

The next form of verdict submitted to you will read:

> "We, the jury in the above-entitled cause, find in favor of the defendant."

Upon your retirement, you will elect one of your number foreman. When you have agreed upon a verdict, the verdict will be signed by your foreman, you will notify the Marshal, and you will be returned into court.

Mr. McNAB.—Might I make a suggestion before the jury retires? It is alleged in our complaint that he was totally disabled as of the date of his discharge, July 10, 1919, although his policy continued in effect, as your Honor has just stated, until January 31, 1920, and it is so alleged throughout the complaint, but I notice, in glancing [71] at the complaint, while it is correct in every respect, when it comes down to the prayer we pray here for judgment on the basis of $57.50 a month from the 10th of July, 1919, but through some inadvertence we allege the date of the disability through some error here, the 27th of July, 1928. I don't know how it got in, but I ask, before the jury retires, to have that part of the prayer amended on its face to read the 10th of July, 1919. That conforms to the allegations.

The COURT.—Yes.

Mr. McNAB.—I don't know whether it is considered permissible to submit a verdict with a date

in it, or not. I do not know whether the jury can remember these dates.

Mr. VAN DER ZEE.—It is a question of fact for the jury what the date was.

The COURT.—I think we will try the jury. I think the jury can remember.

Mr. McNAB.—Our contention is July 10, 1919.

The COURT.—The prayer of the complaint is from July 10, 1919, the date of the discharge. The policy continued in force in any event under payments of premium to January 31, 1920. I think I might advise the jury, so that there will be no misunderstanding, upon these insurance policies the claim of disability may occur at any time during the life of the policy. It is not even necessary that the disability grow out of war service. The policy continues, like every other policy, after the soldier has left the service, for the period of insurance. If the disability occurred at any time prior to January 31, 1920, under the instructions heretofore given you, then the verdict should be for the plaintiff. [72]

I think the jury will be able to remember these dates. July 10, 1919, is the date prayed in the complaint. January 31, 1920, is the date on which the policy terminated, so far as the payments of the premium are concerned.

Mr. VAN DER ZEE.—Your Honor, might I take exceptions to the instructions at this time, first to Defendant's Proposed Instruction No. 8—your Honor gave the jury the first part of that instruc-

tion, and omitted the second part. Whether that was through inadvertence, or not, I do not know.

The COURT.—That was not given.

Mr. VAN DER ZEE.—Intentionally?

The COURT.—Yes.

Mr. VAN DER ZEE.—I, therefore, take an exception, if your Honor please, to the Court's refusal to give the second paragraph of Defendant's Proposed Instruction No. 8, and I also take an exception to the Court's giving of the instructions of plaintiff—plaintiff's instructions are not numbered. I suppose I will have to read them, your Honor. Plaintiff's instruction reads as follows:

> "The Court instructs you that the law does not penalize any man for making sincere efforts to overcome his physical or mental disabilities"—

I desire to except to the Court's giving that part of the instruction upon the ground that is not a correct statement of the law, and prejudicial.

The COURT.—The exception will be noted.

Mr. McNAB.—We have no exceptions to any of the instructions, your Honor.

The COURT.—The jury may retire. [73]

(Thereupon the jury retired and subsequently returned into court with a verdict in favor of the plaintiff.)

Dated: ———, 1930.

———————————,
Attorneys for Plaintiff.
GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and agreed upon by counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said bill of exceptions may be used by either parties plaintiff or defendant, upon any appeal taken by either parties plaintiff or defendant.

Dated:

FRANK H. NORCROSS,
United States District Judge. [74]

———

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME AND TERM WITHIN WHICH TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action, that for the purpose of settling, signing and filing the bill of exceptions in the said case the July, 1929, term of

the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 8 of the Rules of this Court, be extended to and into and so as to include the March, 1930, term of said court to the 7th day of April, 1930, thereof, and

IT IS FURTHER STIPULATED that all of plaintiff's proposed amendments to defendant's proposed bill of exceptions be allowed with the exception of Amendment Number One, which is disallowed.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.
GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

It is so ordered.

FRANK H. NORCROSS,
United States District Judge.

Service of the within bill of exceptions by copy admitted this 15th day of March, 1930.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 31st, 1930. [75]

[Title of Court and Cause.]

PLAINTIFF'S PROPOSED AMENDMENTS TO DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

AMENDMENT No. ONE: Strike out the words "written or otherwise," line 32, page 26, and insert in lieu thereof: "Except an oral denial."

AMENDMENT No. TWO: Strike out the words "you tell him" on line 13, page 37, upon the ground that said words are a repetition of said words.

AMENDMENT No. THREE: After the word "man," line 11, page 53, insert the two examinations by Doctor Wallace, with the order or ruling of the Court permitting the admission into evidence of said examinations.

AMENDMENT No. FOUR: After the word "reading," line 17, page 30, insert the report of Major Mariella, together with the order or ruling of the Court admitting the same in evidence.

AMENDMENT No. FIVE: After the word "reading," line 20, page 30, insert the diagnosis of Doctor M. T. Maynard, at the Veterans' Bureau, with the ruling of the Court admitting the same in evidence.

WHEREFORE, plaintiff prays that his proposed amendments to defendant's proposed bill of

exceptions be allowed and made a part of the bill of exceptions in the above-entitled action.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.

Dated: March 18, 1930.

Service of a copy of the within admitted this 19th day of March, 1930.

GEO. J. HATFIELD,
U. S. Attorney.

[Endorsed]: Filed Mar. 31, 1930. [76]

[Title of Court and Cause.]

VERDICT OF THE JURY.

We, the jury in the above-entitled cause, find for the plaintiff, Sidney T. Burleyson, and fix the date of his total and permanent disability from following continuously any substantially gainful occupation from July 10, 1919.

October 18th, 1929.

OTIS R. JOHNSON,
Foreman.

[Endorsed]: Filed October 18th, 1929, at 12 o'clock noon. [77]

In the Southern Division of the United States District Court, for the Northern District of California.

No. 18,430.

SIDNEY T. BURLEYSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This cause came on regularly to be tried before the above-named court, Hon. Frank H. Norcross, Judge presiding, on the 16th day of October, 1929, at the hour of ten o'clock A. M., John L. McNab and S. C. Wright appearing as counsel for the plaintiff, and Messrs. George J. Hatfield, United States Attorney, and Herman Van Der Zee, Assistant United States Attorney for the Northern District of California, appearing as counsel for the defendant; that a jury of twelve persons was regularly impaneled and sworn to try said cause. Witnesses on the part of plaintiff and defendant were sworn and examined and documentary evidence on behalf of the parties hereto was introduced; after hearing the evidence, the arguments of counsel and the instructions of the Court, the jury retired to consider their verdict, and subsequently returned into court their verdict in words and figures as follows, to wit:

"We, the jury in the above-entitled cause, find for the plaintiff, Sidney T. Burleyson, and fix the date of his total and permanent disability from following continuously any substantial gainful occupation from July 10, 1919.

OTTO R. JOHNSON,
Foreman."

Oct. 18, 1929.

And the Court having fixed plaintiff's attorneys' fees in the amount of ten per centum (10%) of the amount of [78] insurance sued upon and involved in this action,—

IT IS ORDERED, ADJUDGED AND DECREED that Sidney T. Burleyson, plaintiff, do have and recover of the United States of America the sum of Seven Thousand and Seventy-two and 50/100 Dollars ($7,072.50), as accrued monthly installments of insurance at the rate of Fifty-seven and 50/100 Dollars ($57.50) per month, beginning July 10th, 1919.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendant, United States of America, deduct ten per centum (10%) of the amount of insurance sued upon and involved in this action and pay the same to John L. McNab and S. C. Wright, plaintiff's attorneys, for their services rendered before this court, payable at the rate of one-tenth (1/10) of all back payments and one-tenth (1/10) of all future payments which may hereafter become due on account of said insurance said amounts to be paid by the United States Veterans' Bureau to said John L. McNab

and S. C. Wright out of any payments to be made to Sidney T. Burleyson, or his beneficiary in the event of his death before two hundred and forty (240) of said monthly installments have been paid.

Judgment entered October 18th, 1929.

WALTER B. MALING,
Clerk. [79]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The United States of America, defendant in the above-entitled action, by and through Geo. J. Hatfield, United States Attorney for the Northern District of California, feeling itself aggrieved by the judgment entered on the 18th day of October, 1929, in the above-entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit, and prays that its appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: January 17, 1930.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Jan. 17, 1930. [80]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, defendant in the above-entitled cause, being the appellant herein, by and through Geo. J. Hatfield, United States Attorney for the Northern District of California, and in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The District Court erred in denying defendant's motion for nonsuit at the close of plaintiff's case herein upon the following grounds, to wit: First, that the plaintiff's evidence in the case had not established a *prima facie* case and was legally insufficient to sustain a verdict, and second, on the ground that the evidence showed that no disagreement between the plaintiff and the United States Veterans' Bureau existed and that therefore the court had no jurisdiction of the subject matter of the action. [81]

II.

The District Court erred in denying defendant's motion for a directed verdict made at the close of all the evidence in said cause, upon the following grounds, to wit:

1. On the ground that the evidence in this case had not established a *prima facie* case for the plaintiff, and was legally insufficient to sustain a verdict.

2. On the ground that the evidence in this case proved conclusively that the allegations of the complaint have not been established in that plaintiff has been shown to have had continuous employment on several different occasions since the date of the lapse of his policy, and in that there is no evidence whatsoever in the record that any condition of permanent and total disability existed during the period from the time of the lapse of plaintiff's said policy up to the year 1926, and as to the period from 1926 to the date of trial, the evidence shows at the most only a partial disability due to so-called flat feet.

3. On the ground that the evidence showed that the Court had no jurisdiction on the subject matter of this action for the reason that the evidence showed that there did not exist before or at the time of trial a disagreement between the United States Veterans' Bureau and the plaintiff as is required by law as a prerequisite to suit.

III.

The District Court erred in instructing the jury as follows:

> "The court instructs you that the law does not penalize any man for making sincere efforts to overcome his physical or mental disabilities; therefore, if you believe from the evidence that although the plaintiff did at-

tempt to work, and that he was only able spasmodically to do such work through heroic efforts on his part, or to the [82] detriment of his health, you may consider such circumstances as evidence that the plaintiff was unable to follow continuously any substantially gainful occupation."

To which instruction the defendant took exception at the time of the trial herein.

IV.

The District Court erred in refusing to give the second paragraph of defendant's proposed instruction No. 8, which instruction read as follows:

"You may consider the fact of any employment which the plaintiff may have engaged in since his discharge from the Marine Corps, the nature of such employment, if any; the amount of salary received; whether or not the plaintiff gave satisfaction in such employment, and whether or not plaintiff was in fit physical condition to discharge his duties under such employment, in determining the extent and the date of occurrence of the plaintiff's disability, if any.

"If you find that the plaintiff held various positions for a considerable period of time since his said discharge from the Marine Corps, and received the ordinary compensation paid to persons employed in similar occupations, and gave entire satisfaction during that

time, that would be engaging in a gainful occupation continuously, and should be considered by you in arriving at your verdict."

To which refusal to give said second paragraph of said instruction the defendant took exception at the time of the trial herein.

V.

The District Court erred in entering judgment on the verdict herein when the evidence adduced at the trial of this action was insufficient to sustain the verdict or judgment.

WHEREFORE, defendant prays that its appeal be allowed, that this assignment of errors be made a part of the [83] record in its cause, and that upon hearing of its appeal the errors complained of be corrected and the said judgment of October 18, 1929, may be reversed, annulled and held for naught; and further that it be adjudged and decreed that the said defendant and appellant have the relief prayed for in its answer, and such other relief as may be proper in the premises.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant and Appellants.

[Endorsed]: Filed Jan. 17, 1930. [84]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND THAT NO SUPERSEDEAS AND/OR COST BOND BE REQUIRED.

Upon reading the petition for appeal of the defendant and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs or damages shall be required to be given or filed.

Dated: January 17th, 1930.

(S.) FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jan. 17, 1930. [85]

[Title of Court and Cause.]

STIPULATION RE SENDING EXHIBITS TO CIRCUIT COURT OF APPEALS.

IT IS HEREBY STIPULATED by and between the parties hereto that each of the exhibits introduced in evidence in the trial of the above-

entitled action, particularly mentioned in plaintiff's proposed amendments to defendant's proposed bill of exceptions, amendments numbers three, four and five thereof, be sent to the Circuit Court of Appeals for the Ninth Circuit to be used in the appeal of the above-entitled action by the said Appellate Court and to be printed as part of the transcript on appeal, and to be deemed part of the bill of exceptions.

Dated: March 31, 1930.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.
GEO J. HATFIELD,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed April 2, 1930. [86]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said court, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

1. Complaint.
2. Answer.
3. Petition for appeal.
4. Assignment of errors.
5. Order allowing appeal and that no supersedeas and/or cost bond be required.
6. Citation on appeal.
7. Bill of exceptions.
8. Stipulation and order extending time and term within which to file bill of exceptions of March 28, 1930.
9. Plaintiff's proposed amendments to defendant's proposed bill of exceptions.
10. Stipulation *re* sending exhibits to Circuit Court.
11. Verdict and judgment.
12. This praecipe.

GEO. J. HATFIELD,

Attorney for ————————,

[Endorsed]: Filed Mar. 31, 1930. [87]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 87 pages, numbered from 1 to 87 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe and amended praecipe for record on appeal, as the same

remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $36.50, that the said amount will be charged against the United States in my next quarterly account and the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 16 day of June, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [88]

CITATION ON APPEAL.

United States of America,—ss.
The President of the United States of America, to Sidney T. Burleyson, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein the United States of America is ap-

pellant and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 17th day of January, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Receipt of a copy reserving all objections by copy admitted this 18th day of Dec., 1930.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Appellant.

[Endorsed]: Filed Jan. 18, 1930. [89]

[Endorsed]: No. 6167. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Sidney T. Burleyson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 16, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6167

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

BRIEF FOR APPELLANT

GEO. J. HATFIELD,
United States Attorney,

HUBERT WYCKOFF, JR.,
Asst. United States Attorney,

H. A. VAN DER ZEE,
Asst. United States Attorney,
Attorneys for Appellant.

Neal, Stratford & Kerr, S. F

No. 6167

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an action by the insured for the benefits of a policy of War Risk Insurance issued to him during the year 1918, by the United States Government. The policy lapsed February 1, 1920, for non-payment of premiums. The insured claims that the policy matured because of his becoming permanently and totally disabled prior to the lapse of the policy.

The defense of the government is based upon absence of the disagreement between the Director of the Veterans Bureau and the claimant, which is a condition precedent to suit, and also upon absence of the condition of permanent and total disability prior to the date of lapse.

The appeal is from orders of the District Court denying motions of the defendant for a nonsuit and a directed verdict, entering judgment upon the verdict and for two alleged errors concerning the instructions to the jury.

ASSIGNMENT NO. I

At the close of plaintiff's evidence defendant moved for a nonsuit upon two separate grounds (Tr. p. 43): First, for the failure of plaintiff to present any evidence of a disagreement with the United States Veterans Bureau, as alleged in Paragraph VI of the complaint; and second, upon the ground that the allegations of permanent total disability set forth in Paragraph V of the complaint had failed of proof.

The sole proof offered of the alleged disagreement is the testimony of plaintiff himself (Tr. pp. 19, 25, 37), to the effect that on December 14, 1926, he made a claim for compensation and insurance at San Francisco and was told by some unnamed person whom he understood to be "on Rating Board No. 3" (Tr. p. 19) "that you would have to be totally disabled at the time before you could get it."

No evidence was offered as to the identity of the person so described or of his authority either to receive an insurance claim or to deny the same on behalf of the Director of the Veterans Bureau. Plaintiff himself testified that he has never received any written denial of his insurance claim from the Director of the Veterans Bureau or from anyone else (Tr. p. 37).

No written application for insurance benefits was

made by plaintiff (Tr. p. 37), and he relies entirely upon this oral demand made to some unknown employee of the Veterans Bureau for proof of the disagreement alleged in his complaint. Far from proving the disagreement required by the World War Veterans Act, this evidence does not even establish the actual submission to the Bureau of any claim for insurance benefits. And until an insurance claim is actually submitted to the Veterans Bureau and denied by the Director or by some person authorized by official regulation of the Director to pass upon such claims, there can be no disagreement and a suit upon the policy is prematurely filed.

Berntsen v. U. S., No. 6100 this Court, decided June 16, 1930;

Manke v. U. S.)
Candee v. U. S.) 38 Fed. (2d) 624.

The second ground of the motion for a nonsuit specifies the failure of plaintiff to present any evidence of the total and permanent disability which the complaint alleges he has suffered. The plaintiff nowhere in his own testimony, either on direct or cross-examination, goes to the extent of saying that he was permanently and totally disabled within the definition of the Act. He testified to being employed continuously at various positions for a period of seven consecutive years, passing successfully various physical examinations of the large corporations who employed him during that time (Tr. pp. 20-25). He received a substantial wage in every instance for his services, which were mostly of a clerical nature.

One doctor testified for the plaintiff. He first saw plaintiff in August, 1927, more than seven years after the lapse of the policy. He testified to being a general practitioner, not an expert on the disease of thrombo engitas obliterance, and that he had never treated such a case before. His diagnosis as well as the treatment he prescribed were based upon the medical history volunteered by the plaintiff himself, and he ventured no opinion as to when the alleged disability commenced (Tr. pp. 27-36).

Four lay witnesses also testified for the plaintiff. The first of these, Harry A. Peschon, testified that plaintiff was a patient at the United States Government Hospital at Palo Alto during part of January and February of 1929, receiving treatment for some ailment unknown to the witnesses (Tr. p. 38).

The next lay witness was S. H. Simpson, who testified that he knew plaintiff for not more than three years prior to the trial of this case in October, 1929; that plaintiff was employed during part of that time as a night clerk at the Hotel Worth; that plaintiff seemed to have trouble with his feet, particularly fallen arches, but worked from eleven o'clock at night to seven o'clock in the morning as night clerk for a period of about one year (Tr. pp. 39, 40).

The next lay witness was F. W. Smith, who testified that plaintiff had been a roomer off and on at the Herald Hotel, conducted by the witness, for eighteen months preceding the trial, and that during much of that time plaintiff was intermittently a patient at the

government hospitals in Palo Alto and San Francisco (Tr. pp. 41, 42).

Plaintiff's next witness was J. A. Brooks, a cigar clerk, who testified that he knew plaintiff for seven years, and that during all of those seven years except the last, plaintiff had been working outside of San Francisco (Tr. pp. 42, 43).

The balance of plaintiff's evidence was documentary in character and consisted of physical examination reports by three physicians setting forth in each instance, a diagnosis of the physical condition of plaintiff.

The examination by Dr. Maynard, a government consulting physician, dated October 13, 1928, gives a diagnosis of "circulatory disturbance strongly suggestive of thrombo angiitis obliterans." (Stipulation on file herein incorporating this exhibit in the record.)

Major S. U. Marietta, a government doctor, examined plaintiff on March 29, 1929, and gave a diagnosis of thrombo-angiitis obliterans both feet, legs, moderately severe. (Same stipulation.)

Dr. Wallace, a private physician examined plaintiff in 1926 and 1928, and gave a diagnosis of chronic eczema of the feet and toes, and fallen arches. (Similar stipulation on file herein incorporating physician's report in record.)

Thus it is seen that a review of the plaintiff's entire evidence fails to disclose any proof of the allegations of Paragraph V of the complaint, as to permanent and

total disability since July 10, 1919, the date of plaintiff's discharge from the service, and prior to the lapse on February 1, 1920.

The testimony of plaintiff shows substantially gainful employment over a period of seven years, with no more loss of time from employment than would be suffered by a person in average good health, following employment which is seasonal or temporary in character. Plaintiff has not presented any evidence of the existence of his alleged permanent and total disability on July 10, 1919, and his own testimony and that of his witnesses utterly refutes his claim of such disability prior to the lapse of the policy on February 1, 1920.

As was said by this Court in the case of

Barker v. U. S., 36 Fed. (2d) 556

"from the facts shown, to hold total disability would be to do violence to any common or reasonable understanding of the meaning of these terms."

The grounds of the motion for nonsuit, to-wit: First, absence of disagreement with the Director of the Veterans Bureau, and second, absence of any proof whatsoever of permanent total disability prior to the lapse of the policy on February 1, 1920, were therefore well taken and the nonsuit should have been granted.

Sec. 581 Code of Civil Procedure of the State of California;
Manke v. U. S.)
Candee v. U. S.) 38 Fed. (2d) 624;
Berntsen v. U. S., No. 6100 this Court, decided June 16, 1930;
U. S. v. Barker, 36 Fed. (2d) 556.

ASSIGNMENT NO. II

Upon the close of all the evidence in the case, defendant moved for a directed verdict in favor of the defendant (Tr. pp. 73, 74, 75), renewing a similar motion made at the close of plaintiff's evidence (Tr. p. 44). The motion was based upon three grounds:

First, that all of the evidence taken together had not established a prima facie case for the plaintiff and was legally insufficient to sustain a verdict in his favor;

Second, that the evidence showed continuous employment of plaintiff from discharge to the year 1926, and only a partial disability at most thereafter, and that there was no evidence whatsoever of permanent total disability antedating the lapse on February 1, 1920;

Third, that no disagreement with the Director of the Veterans Bureau had been proven.

As to the evidence offered by defendant, four doctors (two Veterans Bureau doctors and two private doctors), who had examined plaintiff at various times from December 15, 1926, to March, 1929, testified that plaintiff during those years was not permanently and totally disabled, was suffering from flat feet only, and was in condition to follow any substantially gainful occupation which he was mentally qualified to pursue. (Tr. pp. 45-63.)

One of the doctors had examined plaintiff for employment with the Southern Pacific Railway Company and another for employment as a cashier and both passed him as physically fit (Tr. pp. 59-63).

Other testimony on behalf of the defendant consisted of records of former employers of the plaintiff, showing his continuous employment by them at various occupations (Tr. pp. 63-66, 68-72), since the date of lapse on February 1, 1920.

An official of a business college testified that plaintiff below attended night school from January 23, 1924, to May 16, 1924, attending school three nights a week, and during that time was absent only six times, which was at a time when he was working during the day (Tr. pp. 67, 68).

The cumulative evidence thus offered by the defendant so far negatives even the possibility of the condition of permanent and total disability alleged by plaintiff below that further comment is unnecessary. The medical testimony as to the physical condition of the appellee subsequent to the lapse of the policy and the undisputed record of employment from 1919 to 1926 were so complete and uncontradicted that to ignore such testimony would be, as this Court said in *Barker v. U. S.*, supra, "to ignore one of the material limitations of the policy."

Upon the motion for a directed verdict the defendant also urged the lack of disagreement with the Director of the Veterans Bureau, which ground it had previously named in its motion for a nonsuit.

For these reasons the motion for a directed verdict should have been granted, and the learned Court below was likewise in error in entering judgment upon the

verdict returned by the jury in favor of plaintiff below upon such plainly insufficient evidence (Assignment V, Tr. p. 97).

ASSIGNMENT NO. III

There was nothing in the evidence indicating that plaintiff below was only able to work spasmodically through heroic efforts on his part, or to the detriment of his health, and the instruction specified in this assignment, based upon this assumption, was properly excepted to as not a correct statement of the law and prejudicial (Tr. p. 86).

ASSIGNMENT NO. IV

The omission of the second paragraph of Defendant's Proposed Instruction No. 8 (Tr. p. 86) deprived the jury of necessary advice by the Court, in properly considering the cumulative evidence of the defendant below as to the long and continuous employment of plaintiff below at various occupations subsequent to the lapse of his policy, and the failure of the Court to give this part of the instruction was properly excepted to (Tr. p. 86).

CONCLUSION

We have here a case with ample precedent within this very Circuit.

As to the lack of disagreement, we need but refer again to

Berntsen v. U. S., supra
Manke v. U. S.) supra
Candee v. U. S.)

As to the sufficiency of the evidence we quote:

U. S. v. Barker, 36 Fed. (2d) 556
U. S. v. McPhee, 31 Fed. (2d) 243
U. S. v. Hill, 33 Fed. (2d) 822
U. S. v. Tracy, 28 Fed. (2d) 570

in each of which cases the judgment of the trial court was reversed for insufficiency.

It is respectfully submitted that the judgment of the learned court below should be reversed, for the errors indicated in the assignments of appellant.

Respectfully submitted,

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HUBERT WYCKOFF, JR.,
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Attorneys for Appellant.

No. 6167

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

BRIEF FOR APPELLEE.

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Attorneys for Appellee.

Subject Index

Table of Authorities Cited

No. 6167

IN THE

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UNITED STATES OF AMERICA,
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Appellee.

BRIEF FOR APPELLEE.

STATEMENT.

This action was brought by the appellee against the United States under and by virtue of the War Risk Insurance Act and the World War Veterans' Act, and amendments and supplements thereto, and is based upon a term policy or certificate of war risk insurance issued under the provisions of the said War Risk Insurance Act approved October 6, 1917, and acts amendatory thereof.

On or about July 30, 1918, at Paris Island, South Carolina, the appellee enlisted in the armed forces of the United States; and he served as a private of the United States Marine Corps until the 10th day of July, 1919, when he was honorably discharged from said Marine Corps, and that during all of said time he was in the active service of said Marine Corps.

That immediately after enlisting in said Marine Corps the appellee made application for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress, and the rules and regulations promulgated by the War Risk Insurance Bureau established by said Act of Congress, in the sum of ten thousand dollars ($10,000); that thereafter there was issued to appellee by said War Risk Insurance Bureau its certificate of appellee's compliance with the War Risk Insurance Act, which entitled the appellee and his beneficiaries to the benefits of said Act; that during the term of appellee's service with the said Navy Department, as aforesaid, there was deducted from his pay for such services by the United States through its proper officers the monthly premiums provided for by said Act of Congress, and the rules and regulations made in pursuance of said Act.

After the appellee commenced his service in the Marine Corps and about the month of November, 1918, he was stricken with influenza at Quantico, Virginia, and was confined in the hospital there for about six weeks. When appellee left the hospital he was ordered back to duty at Quantico, Virginia; thereafter appellee was transferred to the U. S. S. "Albany"; that while appellee was on board the U. S. S. "Albany" en route to Pearl Harbor he was still suffering from the effects of influenza, and was under the care of the Navy physicians on said steamship; that shortly after said steamship arrived in the harbor of Honolulu appellee was stricken with appendicitis, whereupon he was taken to Pearl Harbor about nine miles distant and operated upon for appendicitis;

about twelve days thereafter appellee underwent an operation for the removal of his tonsils; that appellee had not been removed from his hospital cot at any time between operations; that twenty-three days after appellee was discharged from the hospital he was ordered to do work around the barracks; that about one week thereafter appellee was required to drill; to do heavy work, and to be constantly on his feet; that within twelve days thereafter both arches of his feet dropped; that prior to that time the arches of appellee's feet were in normal condition, but within said period of twelve days the arches of his feet dropped clear down—*there were no longer any arches,* and this condition later developed into what is known as *thrombo engiitans obliterans.* This is a chronic affection of the blood vessels, namely: arteries and veins; chiefly, of the hands and feet—the lower extremities from the knees down. It apparently originates as an acute inflammation inside the blood vessels, and ultimately results in *thrombo engiitans obliterans,* and there is no specific cure known; that in the majority of cases of persons suffering from *thrombo engiitans obliterans* amputation is necessary.

The jury on October 18, 1929 rendered its verdict in favor of appellee, and fixed the date of his total and permanent disability from following continuously any substantially gainful occupation from July 10, 1919, and judgment in favor of appellee was thereupon entered.

ARGUMENT.

The appellee contends that the verdict of the jury, and the judgment based thereon are amply sustained by the evidence, and that the judgment should be affirmed.

The United States (defendant) in the court below is seeking a reversal of the judgment upon the following grounds:

(A) That the court erred in denying the motions of the defendant for a nonsuit, and for a directed verdict; (B) That the court erred in giving the instruction set forth in Assignment III; and (C) That the court erred in refusing to give the second paragraph of defendant's proposed instruction No. 8.

We will discuss these grounds in their relative order. The discussion of alleged errors of the court in denying defendant's motions for a nonsuit, and for a directed verdict, will require quite an extensive review of plaintiff's testimony as it appears in the transcript of record.

Sidney T. Burleyson, the plaintiff, testified in substance as follows:

> I was born in Bilen, Mississippi, and am 29 years old. At the time of my enlistment in the Marine Corps I had been on a farm for years except for a period of three months when I worked in a drygoods store. Prior to that I had never worked at anything other than farming. I was 18 years old when I enlisted in the Navy. I enlisted at Memphis, Tennessee, and thereafter I went to Paris Island, South Carolina. I was honorably discharged from the army on July 10, 1919 under the report of a medical survey. After

I commenced my service in the Marine Corps and about the month of November, 1918 I was stricken with influenza at Quantico, Virginia, and was confined in a hospital there about six weeks; thereafter I was sent back to duty at Quantico, Virginia, and shortly thereafter I was transferred to the U. S. S. "Albany." The cold remained with me for awhile, and during the time I was afflicted with influenza I was under the care of the Navy physicians on the steamship "Albany"; I was stricken with appendicitis in the harbor of Honolulu, and was taken to Pearl Harbor where I was operated upon for appendicitis; shortly thereafter my tonsils were removed. I had not been removed from my hospital cot at any time between the operations. I was discharged from the hospital twenty-three days after my last operation, and I was pretty weak when I went to duty. I was ordered back to drill in about a week. After I was ordered back to drill and heavy duty I had terrible pains in my legs, down to my feet, and my arches then dropped down. It was within about twelve days that my arches dropped. At the beginning of the twelve day period my arches were normal and at the end of that period they were down, they dropped clear down; there was no arch; and that condition has existed ever since. My feet and lower limbs at the time swelled so that I could hardly feel my ankle; they swell so big that I cannot stand on them. That condition with regard to my arches and the flatness of my soles has not changed. I was sent to the hospital for about six weeks. I was sent from the hospital on board a ship and a medical survey was held in the Islands, and I was sent back on the ship to Mare Island and discharged there. I went through a

medical survey at the Islands first; a board of doctors commanded that they discharge me from service on disability. I had not made any application for such a survey; that was ordered by my officers. I could not get around at all; if I would move around a little bit it would get so painful that I would almost collapse. That extended up my legs; the swelling went up about half of my legs. I will remove one of my socks so that you may see the condition; that is the general appearance and if I move around much it will be bluer than this; for a long time, while I was working, there were running sores all over my toes; they would swell up and crack open, and matter would come out. When I endeavored to work they would all swell up; my toes would crack open and bleed; it got so painful that I could not stand. I never worked constantly. The skin would break open; it would swell and break open, and the skin would come off, and it would be raw. It disclosed the red tissues underneath; that has been the result whenever I have endeavored to remain on my feet for any length of time. *Since my discharge from the Marine Corps I have endeavored to work; I had to work; I had no other way of living.* After I came out of the service I first attempted to work as a clerk for the Government at Mare Island. I handled containers. When I was required to be on my feet they got so badly swelled—I had a mighty fine boss, and he would let me off quite often, and I would go home and lift my foot until I got the blood back down again, I put them on pillows and got relief that way. I was acting under a physician's instructions when I kept my feet lifted. *The physicians told me I should keep off my feet, but I had to work to make a living.*

There has been no time since my discharge when I have been able to work continuously and without interruption. I have never worked over six weeks without having a day off; it would get so bad I would have to be off. At other times I would have a greater length of time off. I had to finally quit work there, because my feet got swelling so badly I could not get around at all. I had to lay off about a month and it did not do any good. I went back, but I could not stand on my feet; it required me to be on my feet quite a bit. I next worked for the Southern Pacific. I started to work as cashier. I had a stool that I sat on quite a bit. I think I worked there about two weeks. I laid off about three weeks before I went to work again because my feet were in such bad condition that I could not get around. I have attempted to work from time to time. I have never been able to continue in any of these positions; my physical condition always compelled me to quit. *It has been over a year now since I have attempted to do any work at all.* From time to time while I was in these various places attempting to work, I have had physicians attending me. *I hired them and paid them myself.* They were giving me treatments during this period of time. They relieved me while I was off my feet, but when I went back to work again the same thing would come back again. The only time that I get any physical relief is while I am lying down and keeping my feet elevated to keep the blood down. I have been advised by the physicians that in order to get relief I must keep off my feet and keep them elevated most of the time. I have endeavored to follow that advice every day. I have had treatment in the Government hospital at Palo Alto

twice since my discharge. I went there in July of last year. I was there about six weeks, and then I was out for about seventeen days and went back, a little over six months. During the last six weeks I was there they were putting iodine on my feet. It did not help me any that I could see. Most of the time I was in bed. The first time I was there my feet were given some treatment, and then they recommended an operation; then when I went back they did not operate; they put my feet in very tight plaster casts up to here. (Indicating.) I had to have them taken off in about four weeks as they got so painful. There was no improvement in my limbs. I could not walk then at all until I had those taken off. After I left the base hospital the second time I came to the Herald Hotel. I was there about twenty-five days, and about the latter part of March I went into the Letterman Hospital. The attending surgeon was Major Murrell; he was the superior. I was under treatment there about four months. I was a bed patient. I came out June 28; my condition had not changed at all that I could see, but I got out and walked around a little bit they they were swelling again, so I stayed around the Hotel Herald for a day. Since I had these casts taken off my feet I have been using double crutches. *I have not been able to remain at work, however light, continuously. I do not know of any form of work at which I am able to remain.*

On cross-examination the witness testified in substance as follows:

I made application for the relief mentioned in my policy of War Risk Insurance. At the time I filed my application for compensation, one of

the members of the Board that was there when the application was made out—I asked him about the benefits under that, and he said, "No, you are not entitled to any."

Mr. McNab. I neglected to ask one question:

Q. At the time of your discharge from the Army, did you cease paying your premiums on your policy or did you continue to pay them?

A. I paid them for about six or seven months?

Q. After your final discharge from the Army?

A. Yes, sir.

Q. And during all that period of time you were afflicted as you now are?

A. Yes.

Mr. Van Der Zee. Q. You say you made a claim for the insurance benefits?

A. Yes, sir.

The date I applied for compensation was December 24, 1926. I asked at the same time a member of the Board about insurance benefits, and he said you would have to be totally disabled at the time before you could get it; that is the first time that I made any claim of any character for compensation insurance or any other relief from the Government; the man on the rating board turned me down. I don't know his name; he was on Rating Board No. 3. I have never received any communication from the Director of the United States Veterans' Bureau denying any claim of mine for War Risk Insurance benefits. I was discharged from the service on July 10, 1919. I first went to work, after leaving the service, for the Government at Mare Island. They did not give me an examination for that position; just went over you in a way. It was a Civil Service position. They just examined my heart. I was given a clerical position in the Supply

Department. I was container recorder. I had to handle the serial numbers on gasoline tanks and things like that. I was known as a store man. All my work was clerical. I was at the Navy Yard on those various jobs during all of 1919 from July, 1919, to August, 1920. After I left that position I was next employed with the Southern Pacific at Tracy. I was cashier in the restaurant. I did not go there directly from my Mare Island employment. I got a thirty-day leave of absence, they granted it to us at the end of the year, so I did not work the thirty days. I was on the Government pay-roll but I was on vacation. I was off a month there. I was treating myself there for a month. I worked for two weeks and laid off, for about a month, and I worked then for about five or six months. I was not working every day. A lot of that time I was off. I was not on that job all of the time between August, 1920 and November, 1922. I was only there about fourteen days, first. After fourteen days, I was off for awhile and went to Yuma, Arizona, for the Southern Pacific. I worked in the clubhouse as a clerk. I stayed at that employment about five or six months when I quit. I was off a number of times during that period of time. I recall an examination by Dr. Magnin of the Southern Pacific on July 6, 1923. I went in there, but I did not go to work. I went up to Lake Tahoe instead. I don't remember that the doctor asked me if I had any diseases of the feet. That is my signature to photostatic copy purporting to be a physical test record. Referring to the balance of the report I recall now a second physical examination. I did not go to work; there were two physical examinations given me by the Southern Pacific Company. My

last employment by this company was in 1923, I think. My salary was $90.00 a month and found, I think. I was next employed as a hotel clerk at the Merritt Hotel in Oakland for about a month and a half. After that I worked for the Emporium in San Francisco; I was off a number of times during that time. I was not working consecutively. I recall working in the Hotel Del Monte in Monterey for about two months. I was employed in the storeroom there. The first part of the year 1925 I went to work for the Fox Hotel, in Taft, California. I worked there for something like a year and a half, but I did not work steady; I was off a number of times during that time. I started at a salary of $125.00; that did not include my board. I was night clerk. I was feeling so bad I laid off for a long time. I was off for a month, then I went to work as a hotel clerk at Tahoe Tavern. I worked there about three months until October 26, then the season closed, but I could have gone back there, but the doctor told me if I came back there in winter time I would be frostbitten and I would lose my legs. I next went to work for the Whitcomb Hotel in San Francisco as a clerk. I worked there about five weeks. My salary was $90.00 and meals. I got so bad, my feet began to swell, and I could not stay there and I quit. I was off for a month or six weeks. I took a rest and went to the Granada Hotel. I was there just a short time, and then I laid off; my feet got so bad I could not stand it and went to work at the Worth Hotel. I got a straight salary of $125 a month at this hotel. I worked there a little over a year. I left my employment at the Worth Hotel the latter part of June; somewhere thereabouts, or May; but I was in the Palo Alto

hospital in August. I went to night school for awhile during the time I was working at the Emporium. My attendance was irregular. While I was working at the Worth Hotel I went every day for almost a year, taking treatments, as the records will show—I took treatments down at the Veterans' Bureau for almost a year, for over a year, nearly every day. They were light treatments for the broken skin and sores. Dr. Jeppel and Dr. Casey gave them to me. They did not make a thorough examination. They sent me to Dr. Alderson and Wade, and they told me I should be in the hospital. I called up the Veterans' Bureau and told them, and I went down there, and they sent me to Palo Alto Hospital. I did not at any time before the year 1926 make any claim for disability compensation. I signed a waiver—I would like to explain that if you do not mind. When I left the service in 1919 I had to sign a waiver, and so up to that time I didn't know whether I had any claim or not, but I got so bad, and I saw one of the veterans, and he said: "Why don't you go down to the Bureau?" and so I went down to the Veterans' Bureau, and they told me: "You should have come in before." I would have gone there before, but I didn't think I had any claim. He told me that waiver did not mean anything. I do not recall how that waiver read. I only mention that because this other veteran told me what I have just related. At any rate, I made no claim upon the United States Government or did not go to the Veterans' Bureau or any other branch of the Government for relief until 1926.

On redirect examination the witness testified in substance as follows:

When I left the service, before I got my discharge at Mare Island I had to sign this waiver of any claim. I read part of it, and it said: "I waive all claims for treatment in the hospital and for any compensation." I thought that ended my claim. I was first informed that my signature on such a waiver amounted to nothing on December 13, 1926. I went the following day to the Veterans' Bureau. The Bureau did tell me that they would not grant me disability. I was orally informed to that effect by one of the members of the Rating Board number three here in San Francisco. I have never been granted insurance on the basis of total disability. After being so informed, I commenced this suit. A number of places have been mentioned here where I have been employed, seven or eight, my employment at each one terminated because I would get so bad I had to quit and take a rest. I would never advise the people where I was employed of my condition because I figured that would hurt my getting another position after I got out. When I left their employ finally I had no dispute with any of them, *it was just on account of my physical condition.* In these night clerk jobs I was not required to be on my feet very much. For instance, taking the Hotel Worth, my hours there were from eleven at night to seven in the morning. I had very little to do there. I had a big wicker chair and I used to sit with my feet up like this most all night long, because the doctors had advised me to do that, to keep off of them as much as I possibly could. I sometimes wrapped a blanket around me. I went to the Veterans' Bureau for about a year for treatment. I did not get any better. I never had my feet examined by any Southern Pacific official. *When I went*

looking for a job, I was not telling them of my trouble with my feet; if I had I would not get a job. I never occupied a position as rivet heater. I do not know anything about rivet heating, nor do I know anything about working as a machinist. I was working as a clerk all the time I was there. I am a resident of the City and County of San Francisco, and have been ever since my discharge from the service. I am a United States citizen.

Mr. Burleyson, being recalled in his own behalf, testified as follows:

Mr. McNab. Q. Mr. Burleyson, this morning you were asked concerning making application or demand on the Veterans' Bureau for your War Risk Insurance. Did you make such a demand?

A. Yes, sir.

The Witness. That was about that date that I discussed this morning concerning some other demand that was filed; that was at San Francisco. I told them I was unable to do any work and asked if I was entitled to ask for the benefits of my War Risk Insurance, and they told me it was impossible to obtain it. They never changed that ruling, and that is why I brought this suit. (Tr. p. 37.)

On cross-examination the witness testified:

That he made a demand for his War Risk Insurance payments: that he asked a member of the Rating Board of the Veterans' Bureau; that he did not remember the names of any of those men; that he did not make any written application for those payments; that he never received from the Rating Board or anybody else a written statement of their denial of his claim for insurance

benefits; that he asked them, but they told him it was no use. (Tr. pp. 37-38.)

We have at the risk of possible criticism stated at length the substance of plaintiff's testimony. We have done this, so as to give the court a clear picture of plaintiff's condition; to show the efforts and struggles that plaintiff made to work that he might live, notwithstanding that he was suffering from an incurable disease with which he became afflicted while in the service of the Army; and to show that by reason of his disability he was forced to give up position after position, and that he can no longer do any work—no matter how light. The plaintiff *had* to work. He felt that he could not stop. He had to live. We quote his exact words:

> "Since my discharge from the Marine Corps I have endeavored to work; I had to work; I had no other way of living." (Tr. p. 14.)

A graphic account of plaintiff's condition is given by Dr. William Cooper Eidenmuller, an eminent physician and surgeon of San Francisco, and which will be found on pages 27 to 36 inclusive of the transcript.

We submit that when the testimony of this distinguished surgeon is considered in connection with the testimony of the plaintiff; with the report of the physical examination of the plaintiff conducted by Major Marietta, of the Letterman Hospital; the diagnosis of Dr. M. T. Maynard, at the Veterans' Bureau; and the diagnosis of Dr. C. L. Hoy, major in the Marine Corps, at the Presidio, it will clearly appear

that there was substantial evidence adduced to show that the plaintiff became totally and permanently disabled while he was in the service of the Army, and while the policy of War Risk Insurance was in force, and therefore the judgment of the court must be upheld. The most that can be said for the contention of the Government is, that the evidence was conflicting, but we submit that where there is substantial evidence to uphold the judgment, it cannot be disturbed.

The appellee testified that

> *"when I went looking for a job, I was not telling them of my trouble with my feet; if I had I would not get a job."* (Tr. p. 26.)

Counsel for the Government insinuate that the testimony of Dr. Eidenmuller is entitled to little weight because they say that the doctor first saw the plaintiff in August, 1927, more than seven years after the lapse of the policy; that he was not an expert on the disease of *thrombo engiitans obliterans;* that he had never treated such a case before; that his diagnosis as well as the treatment he prescribed were based upon the medical history volunteered by plaintiff, and he ventured no opinion as to when the disability commenced.

The fact that nine years had elapsed between the time that plaintiff became disabled in the service of the United States and the time he consulted Dr. Eidenmuller is the strongest kind of proof that the disability of the plaintiff was not of a temporary nature, but permanent and total in character. A few excerpts from the testimony of Dr. Eidenmuller will be illuminating:

"In my examination into the medical history of Mr. Burleyson, I considered certain conditions that he suffered from, that I looked upon as perhaps the most predisposed to leading to this condition. They were influenza, acute appendicitis, chronic tonsilitis, and the condition of the feet known as flat feet. To my knowledge none of the various causes I have mentioned that have been discussed by branches of the medical industry,—tobacco or intoxicants or syphilis, existed in Mr. Burleyson. *Whatever the cause, it is my opinion that he has the disease. There is not any specific cure known.*" * * * At the same time that I was attending Mr. Burleyson for the condition that he has, I was attending another employee of the same hotel with a condition nearer to Mr. Burleyson's condition than anything else in medical annals, called "raynos" and is so similar that up to twenty-five years ago in this country they were classed under the same general head, and in making the diagnosis in this other case I was able to become enlightened considerably as to the condition that Mr. Burleyson is in, and the net result of those two diseases is about the same; in fact, the other man has since lost both feet and legs below the knees. I prescribed for Mr. Burleyson at that time treatment that could be classed under the head of—general head of physiotherapy. I did not at any time prescribe amputation. No; I did not state my opinion to be that amputation is absolutely necessary in this case; I said this morning that in a serious matter of that kind I always leave the decision to the patient. As far as amputation is concerned the operation would tend to remove from the rest of the body the affected parts, and if it did that he would no longer have that condition, and then,

unless it extended, he would be free from the suffering he is now enduring. During part of the time at least that he was under my care he was also under the care of the Government in hospitals and receiving treatment, so I was not the physician to the full extent I could have him solely in my care. I did not say that amputation was advisable; *I said that a majority of these cases come to amputation,* and further I will say at this time that amputation be performed. This disease is not a result of what is known commonly as flat feet; the specific cause, as I testified this morning is not known, as far as I know, and as far as the authorities know. This man has flat feet. That can be looked upon as a predisposing cause in that it would doubtless incorporate some features that are affected by this condition. * * * To my knowledge there is not any particular specialist in the treatment of this disease as a specialist. It is apparently rather a rare form of disease. I have studied quite a few authorities that are available on the subject. I have never met anybody in the profession to be a specialist in the treatment of this particular disease. When I say that I have not thus far advised amputation *I do not mean to say that amputation may not ultimately be necessary. In the event that gangrene sets in instant amputation would be absolutely necessary to save life. The other case which I described as a very similar condition has required it; the amputation of both limbs below the knees* * * *!" (Tr. pp. 34-35.)

The testimony is undisputed that appellee contracted influenza; that he was operated upon for acute appendicitis; that his tonsils were removed; that the

arches of his feet dropped; and that all this occurred while appellee was in the service of the Army, and that prior to his enlistment appellee was in sound physical health. The appellee could not have passed the rigid physical examination that he did pass, and been taken into the Marine Corps if he had been in unsound health.

Section 200 of the World War Veterans' Act, so far as material, is as follows:

> "That for the purpose of this Act every * * * member employed in the active service who was discharged * * * prior to July 2, 1921 * * * shall be conclusively held and taken to have been in sound condition when examined, accepted and enrolled for service except as to defects, disorders or infirmities made of record in any manner by proper authorities of the United States at the time of or prior to inception of actual service, to the extent of which any such defect, disorder or infirmity was so made of record."

Brandaw v. United States, 35 Fed. (2nd) 181.

> "As permanency of any condition (here total disability) involves the element of time the event of its continuance during the passage of time is competent and cogent evidence."

McGovern v. United States, 294 Fed. 108 (D. C.); affirmed, *U. S. v. McGovern,* 299 Fed. 302.

The Government is forced to concede that the examination by Dr. Maynard, a government consulting physician, dated October 13, 1928, gives a diagnosis of "circulatory disturbance strongly suggestive of *thrombo engiitis obliterans* (Brief of Appellant, p. 5

and stipulation on file herein incorporating this exhibit in the record), and furthermore, that Major S. U. Marietta, a Government doctor, examined plaintiff on March 29, 1929, and gave a diagnosis of *thrombo engiitis obliterans* both feet, legs, moderately severe (same stipulation, Brief for Appellant, p. 5), and that Dr. Wallace, a private physician examined plaintiff in 1926 and 1928, and gave a diagnosis of chronic eczema of the feet and toes, and fallen arches. (Similar stipulation on file herein incorporating physician's report in record.)

The evidence indisputably and without conflict showed that shortly after the appellee was stricken with influenza, he was operated upon for acute appendicitis; that his tonsils were removed; and that within a period of thirty days appellee was, to use his own language:

> "ordered back to drill and heavy duty. I had terrible pains in my legs, down to my feet, and my arches dropped down then. It was within about twelve days that my arches dropped; at the beginning of the twelve day period my arches were normal and at the end of that period they were down, they dropped clear down, there was no arch; that condition has existed ever since. * * *" (Tr. p. 12.)

Can there be any doubt that the attack of influenza; the operation for acute appendicitis; the removal of appellee's tonsils, and that the appellee within thirty days after he left the hospital was forced to drill, and to do heavy duty, resulted in the incurable disease, *thrombo engiitans obliterans* with which appellee is afflicted? We submit that there can be none.

The evidence is undisputed that the appellee paid the premiums on his War Risk Insurance policy for nearly six months after his honorable discharge from the Army; and the evidence is very clear that the appellee became permanently and totally disabled while he was in the service of the Army, and before his policy of insurance lapsed.

The evidence is undisputed that the appellee is unable by reason of his condition to remain at any form of work—however light. (Tr. pp. 17-18.)

Counsel contend that the Government's motions for nonsuit and directed verdict should have been granted because of the alleged failure of plaintiff to present any evidence of disagreement with the Veterans' Bureau.

The answer to this seems obvious and conclusive. The Government with all its files available and the entire Veterans' Bureau at hand closed its case *without offering any evidence whatever to refute the testimony of the plaintiff that he had made the application and that it had been denied.* How could the Government ask a directed verdict in its favor when, with all of its evidence available, it failed to produce any testimony whatever on the subject, and the only showing in the record is that the dispute exists? *The Government failed to plead it or raise the question until the plaintiff had completed his case. The fact that the claim was disputed was the obvious fact on the trial.* An entire afternoon was spent by the Government in an attempt to show that the claim to total disability had been disapproved. To say that there was no showing of disagreement while the Gov-

ernment was actually engaged in showing the disagreement and attempting to justify its position is anomalous to say the least. The Government insists that there was no proof of a demand upon the Director. The undisputed evidence shows that there was a demand upon Officers of the Veterans' Bureau. That Bureau is composed of Directors. What evidence is there to show that such demand was not passed upon by the Director? None. As a matter of fact the testimony is that it was denied, and the Government was content to introduce no evidence to show that it was not done.

The plaintiff made it very clear why he had not made a demand before 1926. When he left the service of the Army plaintiff was compelled to sign a waiver, and it was not until a veteran told him that the waiver did not mean anything that he went to the Veterans' Bureau. (Tr. pp. 24-25.)

The plaintiff made a demand for his insurance benefits, but he was told by the Bureau that it was impossible for him to obtain them. The Bureau never changed this ruling, and plaintiff was compelled to bring suit. If he had not commenced his action when he did the action would have been barred by the statute of limitations.

It ill becomes this great Government to quibble, and attempt to evade the payment of just compensation on the plea that plaintiff made no written application for insurance benefits, and he had not received a cold, formal letter of denial of benefits.

> "* * * The policy is a contract, in the consideration of which every reasonable presumption

must be indulged in behalf of the plaintiff. He was an enlisted man, and the whole scheme of war risk insurance was designed to benefit men who thus served, and who, from any cause during the period of their service, became disabled. Great liberality of construction must therefore be indulged. If this plaintiff can be said to have become totally disabled during his service, even though the cause of it may be traced back to remote conditions, with which his service had nothing to do, I think he should recover a judgment here. The very purpose of the insurance was to protect the service man against such a misfortune. * * *"

Starnes v. United States, 13 Fed. (2nd) at page 213.

The law as it existed when the appellee made application for insurance benefits under his policy of war risk insurance, and when said application was denied, and also when this action was commenced did not require said application or the denial thereof to be in writing.

The essential thing is the *fact* of disagreement.

The cases of *Manke v. U. S.* and *Condee v. U. S.,* 38 Fed. (2nd) 624, and *Berntsen v. U. S.,* 41 Fed. (2nd) 663, cited by counsel, do not hold that a disagreement cannot exist unless it is expressed in terms of writing. In those cases the court said:

"They not only failed to prove that a disagreement existed, but it is in effect conceded that in fact there had been no disagreement. * * *"

The court in the case of *Berntsen v. U. S.,* supra, held that the claim presented to the court for adjudica-

tion *had never been presented to the Bureau*—not that the claim and rejection had to be in writing.

THE EVIDENCE SHOWS THAT PLAINTIFF BECAME PERMANENTLY AND TOTALLY DISABLED WHILE IN THE ARMY, AND THAT THIS DISABILITY OCCURRED WHILE HIS POLICY OF INSURANCE WAS IN FORCE.

We believe that we have sufficiently shown by the record that the plaintiff became permanently and totally disabled while he was a private of the Marine Corps, and before his policy of insurance lapsed. The evidence without conflict showed that the appellee had to work that he might live. Self-preservation is the first law of nature, and in obedience to this law, the appellee worked in position after position only to be forced to give them all up because of his incurable disability.

The evidence showed that the appellee has been unable to find any work—no matter how light—that he can do. And the evidence showed that when plaintiff did work he had to sit in a chair or on a stool, and keep his feet elevated so that he might get relief from the terrible pain and suffering that he would experience if he stood on his feet.

In the case of *United States v. Sligh,* 31 Fed. (2nd) 736, this court said:

> "* * * The question remains whether we should disturb the conclusion of the court below that the plaintiff was totally and permanently disabled during the period for which recovery was sought. While it is true that, when the case was formerly before us, it was observed in the opinion of this

court that force was found in the contention that the plaintiff was not totally and permanently disabled, yet upon a reconsideration of the testimony and in view of the regulations of the bureau and the purpose and intent of the insurance contract, we are not convinced that the conclusion reached by the court below was erroneous. There was testimony of competent physicians as to the plaintiff's disability. Dr. Wylie testified that the plaintiff had a well-advanced case of pulmonary tuberculosis. He said: 'At the present time it would be impossible for him to do any manual labor. I am positive that in the future he will not be able to follow any gainful occupation. Taking the history of the case into consideration I am of the opinion that Mr. Sligh has been unable to do any work since September, 1918. It is very injurious for any man to work with active pulmonary consumption. *It is physically possible for a man to work until he drops dead, but it is very injurious to the health and should not be done.*' Dr. Sweek testified: '* * * It has been inadvisable for Mr. Sligh to do any work since I have known him. Mr. Sligh will never be able to work again. He will not live very long. This man has been disabled since he walked out of the service, and always will be. There has never been a time, from the time he had pneumonia, that he has been inactive. Any man with an active pulmonary tuberculosis is totally disabled.' And the doctor expressed his opinion that the plaintiff has been totally and permanently disabled since prior to his discharge from the army in December, 1918. No reason is suggested why the trial court should not have relied upon this testimony. It is not necessarily contradicted by the plaintiff's own testimony as to the

work he did. The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. *It is enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation. These policies and the statutes applicable to the same are entitled to a liberal construction in favor of the soldier.* United States v. Law (C. C. A.), 299 Fed. 61 (reversed on other ground 266 U. S. 494, 45 S. Ct. 175, 69 L. Ed. 401); United States v. Cox (C. C. A.) 24 Fed. 944."

And in the concurring opinion Judge Dietrich said:

"Had appellee put aside concern for the immediate necessities of his family, and, yielding to the advice of a conservative physician, wholly refrained from work, it may be doubted whether any question would have been raised of his right to receive the insurance. * * *"

Dr. Eidenmuller testified that

"in my opinion the appellee is in a condition to do no work, except to take care of his own feet and legs. If he does do any work beyond simply taking care of himself he may be jeopardizing the length of time he is going to keep his feet and legs or his life. Gangrene occurs in the majority of cases and amputation is the only relief. In my opinion his present trouble will continue throughout the remainder of his life." (Tr. of Record, p. 33.)

Of course, the appellee might have struggled on until he dropped dead, but it can hardly be said that the Act required him to do this.

We submit that the reasoning in the case of *U. S. v. Sligh,* supra, fits this case, and justifies an affirmance of the judgment herein.

In the case of *United States v. Acker,* 35 Fed. (2nd) at page 648 the U. S. C. A. for the 5th Circuit said:

> "For a disability to be total within the meaning of the above referred to provision it is not necessary that the insured's condition be such as to render it impossible for him to engage in any substantial gainful occupation. It is enough that his condition be such as to render him unable, in the exercise of ordinary care and prudence, to engage continuously in any substantially gainful employment. Appellee's disability was not kept from being total by his intermittent business activities, if, without the exercise of ordinary care or prudence, they were engaged in at the risk of substantially aggravating the ailment with which he was afflicted. Metropolitan Life Ins. Co. v. Bovello, 56 App. D. C. 275, 12 F. (2d) 810, 51 A. L. R. 1040; United States v. Sligh (C. C. A.), 31 F. (2nd) 735; New York Life Ins. Co. v. McLean, 218 Ala. 401, 118 So. 753. * * *"

Counsel mainly rely upon the case of *United States v. Barker,* 36 Fed. (2nd) 556, that plaintiff was not totally disabled, and prevented from following continuously any substantially gainful occupation.

In that case Dr. Wheeler testified:

> "At the time he left my care there was not, as I remember, anything in his condition at that

time as I found it, which would have precluded him from following continuously many substantially gainful occupations. Of course, the time he left my hospital he was recently out of the hospital and a man after an operation of this kind takes a little time to get his strength. But I remember no condition which would interfere with his working. * * *"

U. S. v. Barker, supra, page 559.

Dr. Eidenmuller, as before recited, testified:

"in my opinion the appellee is in a condition to do *no work,* except to take care of his own feet and legs. If he does do any work beyond simply taking care of himself he may be jeopardizing the length of time he is going to keep his feet and legs or his life. Gangrene occurs in the majority of cases and amputation is the only relief. *In my opinion his present trouble will continue throughout the remainder of his life."*

We submit that in the light of the evidence and the authorities cited, that the motions for nonsuit and a directed verdict were properly denied; that the court was justified in giving plaintiff's instruction (Assignment of Error III, Tr. p. 95), and in refusing to give the second paragraph of Defendant's Proposed Instruction No. 8. (Tr. p. 86.)

And in conclusion we further submit that common justice demands that the judgment should be affirmed; that the evidence shows that the appellee became totally disabled while in the service of the Army, and before his insurance lapsed; that he is suffering from an incurable disease, *thrombo engiitans obliterans;*

that this will continue throughout his life; and that the appellee is no longer able to do any work.

Dated, San Francisco,
September 24, 1930.

Respectfully submitted,

JOHN L. MCNAB,
S. C. WRIGHT,
Attorneys for Appellee.

No. 6167

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant.

vs.

SIDNEY T. BURLEYSON,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

JOHN L. McNAB,
S. C. WRIGHT,
Crocker First National Bank Building, San Francisco.
Attorneys for Appellee and Petitioner.

No. 6167

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant.

vs.

SIDNEY T. BURLEYSON,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellee, Sidney T. Burleyson, by his attorneys John L. McNab and S. C. Wright, respectfully prays that this court grant a rehearing in this case, and in support of such prayer submit the following reasons:

The court in reversing the judgment said:

"General Order No. 387, promulgated June 6, 1929, delegates authority to regional managers to effect final denial of claims for insurance benefits, in accordance with the provisions of that order, but prior to that time so far as we are advised authority to effect such denial was vested in the director of the Bureau alone. At least, our attention has not been directed to any provision of

> law, or any regulation promulgated by the director, vesting any such authority in a Rating Board, or an individual member of such Board; and upon independent investigation we have found none. The court below was therefore without jurisdiction; and under such circumstances any discussion of the merits by this court would be out of place."

The government, in its brief, did not dwell on the lack of authority in the Rating Board to deny the claim. For that reason we did not cite authorities on that question and therefore give the court the benefit of the authorities set forth in this petition.

General Order No. 387, promulgated June 6, 1929, has no application to the facts in the instant case.

Appellant's demand for his war risk insurance payments was made and denied on December 14, 1926, long prior to June 6, 1929, when General Order No. 387 was promulgated, and the action was commenced on May 24, 1929, also prior to the promulgation of said General Order No. 387.

We beg to differ with the court that prior to the promulgation of General Order No. 387 that the sole and exclusive authority to effect final denial of claims for insurance benefits was vested in the director of the Bureau alone, and in support of this contention we call the court's attention to an opinion of Hon. William D. Mitchell, Attorney General of the United States, rendered while he was Solicitor General, in the case of Edward Shields Cross (17-70-8) rendered January 23, 1929. The question arose as to whether

an appeal should be recommended involving the question of whether a disagreement existed with the Bureau under Section 19. In commenting upon the procedure regarding the presentation of claims for insurance, Mr. Mitchell said:

> "I understand from conferences with the Bureau's representatives that the regulations provide that ratings are made in the first instance by the claims and rating board, and that these ratings cover both compensation cases *and insurance cases;* that Regulation 74 provides that the decision of the claims and rating board shall be final unless appeal is taken to the Central Board of Appeals, and there is a regulation that if the veteran is dissatisfied with the decision of the Central Board he may appeal to the Director, who has an advisory group on appeals who make recommendations as to his action * * *
>
> A decision of a rating board, not appealed from, has the same effect as would a personal decision by the director. It represents the decision of the Bureau on the claim.
>
> In this case, as I understand it, no appeal was taken by the veteran from the decision made in 1925 by the claims and rating board, holding that he was not permanently and totally disabled, and no such appeal having been taken and no new evidence presented by him, under the regulations the decision of the claims and rating board was the final decision of the Bureau."

A reading of this opinion discloses that the Rating Board of the Veterans' Bureau has the power and authority to adjudicate claims for both compensation and *insurance* purposes.

Further commenting upon the finality of the ruling of the Rating Board, Mr. Mitchell said:

> "The fundamental question in this type of case is whether, if a decision is rendered, which is the decision of the Bureau, by a board to which has been lawfully delegated the power to make a decision for the Bureau, there is a disagreement between the claimant and the Bureau within the meaning of the statute. The contention of the Bureau, as I understand it, is that since the veteran is given the right of appeal from the decision of the claims and rating board, if he does not exercise it he acquiesces in and agrees to the decision of the claims and rating board, and consequently there is no disagreement.
>
> This argument leads to the conclusion that no veteran may maintain a suit against the United States on his contract of insurance until he has exhausted by various appeals all the remedies given him by the regulations of the Bureau. I think it is very doubtful whether such a contention will be sustained. The courts are very likely to hold that the statute does not provide that he must have exhausted every recourse within the Bureau. It merely provides that there shall be a disagreement, and if there is a decision against the claimant by a board having lawful power to make it, and whose decision is the decision of the Bureau, and final unless appeal is taken to a higher board or official, that decision constitutes a disagreement between the veteran and the Bureau on the claim * * *
>
> At the conference it was suggested that there may be a distinction between a case where denial of the rating of permanent and total disability is a reversal of former action, and a case where the

denial of permanent and total disability is the first and original ruling on the claim. I see no ground for distinction between these two classes of cases. It makes no difference in principle whether the claims and rating board in denying the claim for permanent and total rating is acting for the first time or reversing a former decision.

The question in either case is whether a decision denying the claim made by a board to which lawful authority is delegated operates to produce a disagreement within the meaning of the statute, or whether it is necessary for the veteran to exhaust his remedies by appeal within the Bureau before it can be said that there is a disagreement. In either type of case the question is whether by failing to appeal within the Bureau the veteran has accepted and agreed to the award against him. Of course, the regulations providing for appeals within the Bureau were intended to insure to the veteran every possible chance of a full and fair hearing by one board after another before he should be compelled to resort to litigation, but these regulations would work greatly to the disadvantage of the veteran in many cases by postponing his right to suit and delaying the institution of the suit pending a succession of Bureau appeals * * *

If the regulations for successive appeals within the Bureau were intended to benefit the veteran by giving him every opportunity to secure justice, why inflict them on him, if he does not want to take advantage of the right to appeal? After all, speedy results are what the veterans want, and where the *initial board has decided against him, and he thinks it a waste of effort to appeal or that he will get a quicker settlement by suit, why prevent it?*

In my judgment, if there is an adverse decision on a claim by any board or tribunal within the Bureau to whom has been lawfully delegated the power to act on it, *that constitutes a disagreement* between the claimant and the Bureau, and the claimant is not required, as a condition precedent to suit, to take all the appeals and demand all the rehearings which the Bureau regulations permit, and he cannot properly be said to consent to and acquiesce in the Bureau's decision because he brings a suit instead of resorting to appeals within the Bureau.

William D. Mitchell,
Solicitor General."

In the case of *U. S. v. Jensen,* 36 Fed. (2d) 47, the Government quoted in their supplemental brief, General Order No. 302 of the Veterans Bureau, dated January 31, 1925, and which is as follows:

"U. S. Veterans' Bureau,
January 31, 1925.

General Order No. 302

Subject: Permanent Total Ratings for Compensation and Insurance Purposes.

The following General Order is hereby promulgated for observance by all officers and employees of the U. S. Veterans' Bureau:

1. Effective February 16, 1925, the Claims and Rating Boards of the several regional offices will review all claims for permanent, total disability and regional offices shall make payments for such compensation. The ratings as made by the Claims and Rating Boards shall be final, except in (a) below, for compensation or insurance purposes subject only to final action by the Central Board

of Appeals or an area unit thereof, in case of an appeal.

a. Where it is clear that an erroneous rating has been made such rating shall be returned to the regional office and attention called to the error in question prior to the adjudication of insurance by the Central Office.

2. In all cases where a claimant shall be rated permanently and totally disabled for compensation or *insurance purposes,* the following evidence shall be submitted to the Central Office, attention of the Claims Division:

a. A signed copy of the proceedings of the Claims and Rating Board with the rating—This shall be a signed first carbon of the original rating.

b. In case of non-concurrence by any member or members, a signed minority report giving reasons for non-concurrence as provided in paragraph 5 of General Order No. 279.

c. Copy of the entire award brief face certified to by the Chief of the Claims Division, together with a certificate over his signature showing that the claimant's rights have not been forfeited by reason of the provisions of Section 23 of the World War Veterans' Act 1924.

3. When claimants have been rated permanently and totally disabled under paragraph 1 above, the claimant's case file will be retained in the regional office unless for some reason the Central Office will continue payments of compensation.

4. Where a claimant is rated permanently and totally disabled for insurance purposes only, his case file will be retained in the Regional Office and the information required under Section 2 of this

order immediately forwarded to the Central Office, attention Claims Division, for consideration of insurance benefits.

5. Upon receipt in the Central Office of the documents above outlined, the Claims Division will secure the insurance file and proceed to adjudicate the benefits of insurance, and if payable, checks will be issued in accordance with finance instructions.

6. Upon an appeal from a decision of the Claims and Rating Board to the Central Board of Appeals, the entire case file, including the rehabilitation folder, shall be forwarded to Central Office or to the section of the Board assigned for duty in the area in which the appeal is made. The Area Board will make three signed copies of its decision. One signed copy shall be forwarded to Central Office, attention Claims and Insurance Service, and the original copy securely fastened in the case file and forwarded to the Claims Division of the regional office transmitting the appeal.

7. All permanent total ratings under the provisions of this General Order shall show the date of receipt of proof of permanent and total disability.

8. All foreign relation cases are to be adjudicated in the Central Office and any claims cases of this character located in the regional offices will be at once forwarded to the Central Office.

9. Section 7155 (a) of Regulation No. 74, which contains matters of procedure, is hereby modified accordingly.

Frank T. Hines,
Director."

Vol. 1, page 968, Regulations U. S. Veterans' Bureau.

We submit that the denial of appellee's claim for war risk insurance benefits by the Rating Board constitutes a disagreement between the Bureau and the appellee, within the meaning of the letter of the Attorney General, and General Order No. 302, and therefore this petition for a rehearing should be granted.

The cases cited in the opinion of the court, viz: *Manke v. United States,* 38 Fed. (2d) 624; and *Bernsten v. United States,* 41 F. (2d) 663, do not hold to the contrary.

In the *Manke* case the court held that:

> "A 'disagreement' must arise before an action can be brought, or, in other words, such a 'disagreement' constitutes a condition precedent to the right to institute and maintain an action, and for that reason is jurisdictional. * * *"

The court said:

> "They not only failed to prove that a disagreement existed, *but it is in effect conceded that in fact there has been no such disagreement.* * * *"

This appellee made no such admission, but on the contrary, he has persistently claimed that a "disagreement" existed, and that he has sufficiently proved such "disagreement." It is not claimed by the court that the "disagreement" must be evidenced by any writing, but that the denial of insurance benefits was vested in the director of the Bureau alone. This, we submit, is contrary both to the opinion of the Attorney General of the United States rendered while he was Solicitor General, and to General Order No. 302.

In the case of *Bernsten v. United States,* supra, this court said:

> "The disagreement contemplated by the statute must be a rejection by the government through the Bureau of the very claim which the applicant later presents by his suit."

Neither the court nor counsel for the government contended that the claim presented by appellee to the Bureau for allowance was *not* the claim presented by his suit.

In the case of *Starnes v. United States,* 13 F. (2d) at p. 213, the court said:

> "The whole scheme of war risk insurance was designed to benefit men who thus served, and who, for any cause during the period of their service, became disabled. Great liberality of construction must therefore be indulged. * * *"

This court decided to the same effect in the case of *U. S. v. Sligh,* 31 F. (2d) 736.

The whole case was fought out on the *disagreement.* The government vigorously contested the fact of the veteran's disability and produced much evidence in an attempt to disprove it. After producing testimony on the fact of disagreement, is it not anomalous to suggest there was no disagreement?

Applying said rule of liberal construction to the facts in the case at bar as the court is required to do, and in the light of the opinion of the Attorney General, and General Order No. 302, we submit that the

disagreement was sufficiently proved, and that a rehearing should be granted.

Dated, San Francisco,
November 5, 1930.

JOHN L. MCNAB,
S. C. WRIGHT,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that we are of counsel for appellee and petitioner in the above entitled cause, and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
November 5, 1930.

JOHN L. MCNAB,
S. C. WRIGHT,
Attorneys for Appellee and Petitioner.

No. 6171

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPH ODILON SECORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6171

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH ODILON SECORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDICTMENT.

Vio. Act of Oct. 28, 1919, Known as the National Prohibition Act.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [2]

COUNT I.

That JOSEPH ODILON SECORD, *alias* Odilon J. Secord, on the eighteenth day of July, in the year of our Lord one thousand nine hundred and twenty-eight, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, sixteen (16) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said Joseph Odilon Secord, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the Na-

tional Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

That JOSEPH ODILON SECORD, *alias* Odilon J. Secord, on the twentieth day of July, in the year of our Lord one thousand nine hundred and twenty-eight, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, sixteen (16) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said Joseph Odilon Secord, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT III.

That JOSEPH ODILON, SECORD, *alias* Odilon J. Secord, on the twenty-first day of July, in the year of our Lord one thousand nine hundred and twenty-eight, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, sixteen (16) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said Joseph Odilon Secord, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [5]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT IV.

That JOSEPH ODILON SECORD, *alias* Odilon J. Secord, on the twenty-first day of July, in the year of our Lord one thousand nine hundred and twenty-eight, at the City of Seattle, in the Northern Division of the Western District of Washington,

and within the jurisdiction of this Court, then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, three (3) gallons, eleven (11) pints, and eleven (11) half-pints of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, intended then and there by the said Joseph Odilon Secord for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said Joseph Odilon Secord, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [6]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT V.

That prior to the commission by the said JOSEPH ODILON SECORD, *alias* Odilon J. Secord, of the said offense of possessing intoxicating liquor herein set forth and described in manner and form as aforesaid, said JOSEPH ODILON

SECORD, *alias* Odilon J. Secord, on the 14th day of March, 1921, in cause No. 5724, at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the first offense of possessing intoxicating liquor on the 1st day of December, 1920, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [7]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT VI.

That prior to the commission by the said JOSEPH ODILON SECORD, *alias* Odilon J. Secord, of the said offense of possessing intoxicating liquor herein set forth and described in manner and form as aforesaid, said JOSEPH ODILON SECORD, *alias* Odilon J. Secord, on the 9th day of April, 1925, in cause No. 9983, at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the second offense of possessing intoxicating liquor on the 1st day of August, 1925, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [8]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT VII.

That JOSEPH ODILON SECORD, *alias* Odilon J. Secord, from the eighteenth day of July to the twenty-first day of July, inclusive, in the year of our Lord One Thousand Nine Hundred and Twenty-eight, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, and at a certain place situated at 83 Pike Street, Seattle, Washington, and known as the Outlook Hotel, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, distilled spirits, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said Joseph Odilon Secord, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ANTHONY SAVAGE,
United States Attorney.
PAUL D. COLES,
Assistant United States Attorney. [9]

[Endorsed]: A true bill.

M. J. BEEZER,
Foreman Grand Jury.
ANTHONY SAVAGE,
U. S. Attorney.

[Endorsed]: Presented to the court by the foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court Sep. 24, 1928.

ED. M. LAKIN,
Clerk.
By S. E. Leitch,
Deputy. [10]

[Title of Court and Cause.]

ARRAIGNMENT AND PLEA.

Now on this 8th day of October, 1928, defendant Joseph Odilon Secord, *alias* Odilon J. Secord, accompanied by his attorney, Fred C. Campbell, comes into open court for arraignment and answers that his true name is Joseph Odilon Secord. He waives reading of the indictment and enters his plea of not guilty.

Journal No. 16, at page 333. [11]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find the

defendant, Joseph Odilon Secord, is guilty as charged in Count I of the Indictment herein; and further find the defendant, Joseph Odilon Secord, is guilty as charged in Count II of the Indictment herein; and further find the defendant, Joseph Odilon Secord, is guilty as charged in Count III of the Indictment herein; and further find the defendant, Joseph Odilon Secord, is guilty as charged in Count IV of the Indictment herein; and further find the defendant, Joseph Odilon Secord, is guilty as charged in Count V of the Indictment herein; and further find the defendant, Joseph Odilon Secord, is guilty as charged in Count VI of the Indictment herein; and further find the defendant, Joseph Odilon Secord, is guilty as charged in Count VII of the Indictment herein.

JAMES A. WOOD,
Foreman.

[Endorsed]: Filed Jun. 4, 1929. [12]

[Title of Court and Cause.]

SENTENCE.

Comes now on this 24th day of June, 1929, the said defendant, Joseph Odilon Secord, into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he

nothing says save as he before hath said, wherefore by reason of the law and the premises, IT IS CONSIDERED, ORDERED and ADJUDGED by the Court that the defendant is guilty of selling intoxicating liquor as charged in counts 1, 2, and 3 of the indictment, of possession of intoxicating liquor as charged in count 4 of the indictment, of prior conviction of possession of intoxicating liquor as charged in counts 5 and 6 of the indictment, and of maintaining a common nuisance as charged in count 7 of the indictment, all in violation of the Act of October 28, 1919, known as the National Prohibition Act, and that he be punished by being imprisoned in the Kitsap County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of six (6) months on each of counts 1, 2, 3, and 7, said terms of imprisonment to run concurrently, and for the term of three (3) months under counts 4, 5, and 6, said jail sentences to run concurrently with above jail sentence, and to pay a fine of $500.00 under counts 4, 5, and 6 of the indictment; and the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree, Vol. 6, at page 277. [13]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Plaintiff Herein, and to the Plaintiff's Attorney:

You, and each of you, are hereby notified that the defendant gives notice of appeal from the judgment entered against him, and each and every part thereof, in the Circuit Court of Appeals of the United States for the Ninth Circuit.

FRED C. CAMPBELL,
G. T. McKINNEY,
JOHN T. DORE,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 25, 1929. [14]

[Title of Court and Cause.]

PETITION FOR APPEAL.

In the Above-entitled Court, and to the Honorable JEREMIAH NETERER, Judge Thereof:

Comes now the above-named defendant, Joseph Odilon Secord, and by his attorney, John F. Dore, respectfully shows that on the 4th day of June, 1929, a jury impaneled in the above-entitled court and cause returned a verdict finding the above-named defendant guilty of the indictment theretofore filed in the above-entitled court and cause; and thereafter, within the time limited by law,

under the rules and order of this Court, the defendant moved for a new trial, which said motion was by the Court overruled and an exception thereto allowed; and thereafter, on the 24th day of June, 1929, this defendant was by order and judgment and sentence of the above-entitled court in said cause sentenced as follows:

> Counts I, II, III, and VII and each of them 6 months in Kitsap County Jail to run concurrently, and on Counts 4, 5, 6, three months in Kitsap County Jail, to run concurrently with other jail sentence and to further pay the sum of $500 as a fine. This fine is on the possession count and former conviction of possession.

And your petitioner herein, feeling himself aggrieved by said verdict and the judgment and sentence of the Court herein, as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petitions this court for an order allowing him to prosecute an appeal from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that the said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and the manifest error appearing upon the face of the record of said proceedings and upon the trial of said cause may be by said Circuit Court [15] of Appeals corrected; and therefore, premises considered, your petitioner prays that an

appeal lie to the end that said proceedings of the District Court of the United States for the Western District of Washington may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith, and that pending the final determination of said appeal by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination, said defendant be admitted to bail.

JOHN F. DORE,
FRED C. CAMPBELL,
G. T. McKINNEY,
Attorneys for Defendant. [16]

[Title of Court and Cause.]

ORDER ALLOWING AN APPEAL.

An appeal is granted on this 24 day of June, 1929, and it is further ORDERED that, pending the review herein said defendant, Joseph Odilon Secord, be admitted to bail, and that the amount of the supersedeas bond to be filed by said defendant be the sum of Two Thousand Cash, to be deposited with Clerk of this court,

And it is further ORDERED that, upon the said defendant's filing his bond in the aforesaid sum, to be approved by the Clerk of this court, he shall be released from custody pending the determination of the appeal herein assigned.

Done in open court, this 24 day of June, 1929.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jun. 25, 1929. [17]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant above named and assigns as error:

I.

That the Court erred in permitting the cross-examination of the defendant Secord in the following particulars:

Q. Have you ever been convicted of crime?

Mr. McKINNEY.—I object to that as not proper cross-examination.

The COURT.—Overruled.

A. I don't know what you call a crime.

Q. Answer the question.

The COURT.—He asked whether you have ever been convicted.

The WITNESS.—Yes, in this court.

Q. How many times?

A. I paid a fine in 1921 and one in 1926, I think it was.

II.

The Court erred in the instruction wherein he told the jury, "If the jury finds he was formerly

convicted,—and he says he has paid a fine in this court. * * * ''

III.

The Court erred in giving the following instruction: ''He likewise had those two serving glasses. He told you where he got it. It is immaterial where he got it, if he had it in his possession, he had no right to it.'' [18]

IV.

The Court erred in giving this instruction: ''or, if you believe that he had this in his own hand and in his pocket, then he would be guilty of possession of it.''

V.

The Court erred in giving the following instruction: ''As to the nuisance charge, if this liquor was found in this building, then of course it was in violation of the National Prohibition Act, and he is guilty of maintaining a nuisance, if it was there for the purpose of sale, and, if he made the sale, it was for the purpose of sale.''

The defendant, through his attorneys, proposes these assignments of error as a basis of appeal, notice of which has heretofore been given.

FRED C. CAMPBELL,
G. T. McKINNEY,
JOHN F. DORE,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 25, 1929. [19]

[Title of Court and Cause.]

APPEAL AND BAIL BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Joseph Odilon Secord, as principal, and ————, as surety, and ———— as surety, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Two Thousand Dollars ($2,000), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that, whereas the said defendant was, on the 24th day of June, 1929, sentenced on Count I, II, III, and VII, and each of them, to serve 6 months in Kitsap County jail, to run concurrently, Counts 4–5–6 three months in Kitsap County jail to run concurrently with other jail sentences, and to further pay a sum of $500.00 as a fine, the fine being on the possession and former conviction count, and whereas the defendant has prayed an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and whereas the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of Two Thousand ($2,000) Dollars,—

NOW, THEREFORE, if the said defendant, Joseph Odilon Secord, shall diligently prosecute

his said appeal to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made, in the [20] premises, and shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect. The defendant deposits $2,000 cash as surety on this bond and as a guarantee to pay said fine is affirmed.

JOSEPH ODILON SECORD. (Seal)

Attest: ————————.

O. K. Approved:

NETERER,
Judge.

[Endorsed]: Filed Jun. 23, 1929. [21]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 4th day of June, 1929, at the hour of 2:00 o'clock P. M., the above-entitled cause came on regularly for trial in the above-entitled court, before the Honorable Jeremiah Neterer, Judge thereof, the plaintiff appearing by Hamlet Dodd, Assistant United States District Attorney, its attorney and counsel, the defendant appearing in person and by Fred Campbell and C. T. McKinney, his attorney and counsel.

A jury having been regularly and duly impanelled and sworn to try the cause, and the assistant United States Attorney having made a statement to the jury, and the opening statement on behalf of the defendant having been reserved until the close of plaintiff's case the following proceedings were had and testimony taken, to wit: [22]

TESTIMONY OF THOMAS MURPHY, FOR THE GOVERNMENT.

THOMAS MURPHY, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am a federal prohibition agent. I went to the Outlook Hotel on July 18, 1928, in company with a man named Davis. The defendant sold Davis a pint of whiskey for which I paid him two dollars.

(Testimony of Thomas Murphy.)

On July 20th I returned with Agent Long. He sold us a pint of whiskey for two dollars at that time.

On July 21, 1928, he sold us a pint of whiskey for two dollars.

Government's Exhibit 1 is the whiskey purchased on July 18; Government's Exhibit 3 is the whiskey purchased on July 21st; Government's Exhibit 6 is the whiskey purchased on July 20th.

Cross-examination.

Q. Where is Mr. Davis?

Mr. DODD.—I object to that.

The COURT.—Sustained. Sustained at this time. If the Government does not produce him I will tell the jury about it.

Mr. McKINNEY.—Exception.

Q. Who else besides Davis did you take up to the Outlook Hotel?

A. Davis took me. I then took Agent Long.

TESTIMONY OF GARFIELD LONG, FOR THE GOVERNMENT.

GARFIELD LONG, a witness produced on behalf of the [23] *the* Government, being duly sworn, testified as follows:

Direct Examination.

I went to the Outlook Hotel with Agent Murphy on July 20, 1928. I bought a pint of moonshine whiskey for two dollars. I went there on the 21st of July. Practically the same thing happened.

TESTIMONY OF ERVIN F. CARROTHERS, FOR THE GOVERNMENT.

ERVIN F. CARROTHERS, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am a federal prohibition agent. I participated in the search of the Outlook Hotel on July 21, 1928. Driver Fletcher and I went to the Outlook Hotel. We met the defendant in the hall. We asked him to sell us some moonshine whiskey. He refused and said he didn't know us and didn't have any to sell. We went back to the street and met Agents Reagan and Johnson. We returned with a federal search-warrant. I saw Johnson take from the defendant's pocket two whiskey serving glasses and a pint bottle partly filled with moonshine whiskey. The search-warrant was served upon him, and in room 218, which is near the office, we found five pints and six half-pints and two whiskey serving glasses. In the half-pints and pints there was moonshine whiskey. In room 202 we found 200 empty pint flasks and some coloring matter for coloring moonshine whiskey, and a siphon hose. In room 320 we found three one-gallon jugs of moonshine whiskey and several pints of moonshine whiskey in a suit case. No one occupied rooms 202 and 320.

Government's Exhibit 8 is one of the gallon jugs of moonshine whiskey taken from the Outlook Hotel, at 83 Pike Street. [24]

(Testimony of Ervin F. Carrothers.)

Government's Exhibit 2 is a pint that was taken from the defendant; Government's Exhibit 4 is one of the half-pints found in room 218. Exhibit 7 was found in room 320; Exhibit 10 was found in the same place as Government's Exhibit 2.

The defendant admitted the liquor in room 218 and the bottles in room 202 was his. He disclaimed ownership of that in room 320.

The keys were furnished us by the defendant.

Cross-examination.

The Outlook Hotel is an ordinary transient hotel.

TESTIMONY OF HERBERT FLETCHER, FOR THE GOVERNMENT.

HERBERT FLETCHER, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am a driver for the federal prohibition department. I was present at the raid of the Outlook Hotel on July 21, 1928. In room 218 was some moonshine whiskey. In room 202 there were some empty glasses. I did not hear the defendant make any statement relative to the ownership of the property in the rooms.

TESTIMONY OF LEONARD REGAN, FOR THE GOVERNMENT.

LEONARD REGAN, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am a federal prohibition agent. On July 21, 1928, I went to the Outlook Hotel. Johnson searched Secord in my presence and took from him a pint bottle and a couple of [25] serving glasses. Secord gave us the keys to the hotel. In room 218 we found six half-pints and five pints on the floor, and the serving glasses, I think, in that room. In room 202 we found a crate just as it had been sent from the bottle house. There was another small crate. We went upstairs to room 320 and found a couple of suitcases and three one-gallon jugs of moonshine whiskey and a number of pints and half-pints and five or six bottles. I went down and got Secord. He was very much excited and wanted to know if there wasn't some way he could fix it up. He disclaimed ownership of the liquor found in room 320. To the best of my recollection he admitted ownership of the liquor on the ground floor.

Cross-examination.

He denied ownership of the liquor in room 320.

TESTIMONY OF F. A. JOHNSON, FOR THE GOVERNMENT.

F. A. JOHNSON, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I went to the Outlook Hotel on July 21, 1928. The defendant had two serving glasses in his hand and a pint bottle in his pocket. Government's Exhibit 2 is the bottle. Government's Exhibits 9 and 10 are the glasses.

TESTIMONY OF EARL CORWIN, FOR THE GOVERNMENT.

EARL CORWIN, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

The liquor in court in the exhibits runs about forty per cent alcohol. [26]

TESTIMONY OF TRUMAN EGGERS, FOR THE GOVERNMENT.

TRUMAN EGGERS, witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am one of the deputy clerks of this court.

(Testimony of Truman Egger.)

Cause No. 5724 is United States vs. Joseph Odilon Secord.

Q. Will you read the sentence of the Court in that Cause No. 5724?

(Witness reads judgment and information.)

TESTIMONY OF GORDON B. O'HARA, FOR THE GOVERNMENT.

GORDON B. O'HARA, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I was a federal prohibition agent in 1921. The defendant in this case, Secord, is the same man who was charged in Cause 5724.

TESTIMONY OF TRUMAN EGGER, RECALLED FOR THE GOVERNMENT.

TRUMAN EGGER, recalled on behalf of the Government, testified as follows:

The witness reads the information in Cause No. 9983, United States of America vs. Joseph Odilon Secord. Reads Count II, wherein the defendant was charged with possession of certain intoxicating liquor.

Reads sentence showing defendant was ordered to pay a fine thirty-five dollars.

TESTIMONY OF WILLIAM WHITNEY, FOR THE GOVERNMENT. [27]

WILLIAM WHITNEY, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am legal adviser for the prohibition department.

The defendant is the same person who was convicted in Cause No. 9983.

DEFENDANT'S EVIDENCE.

TESTIMONY OF JOSEPH ODILON SECORD, IN HIS OWN BEHALF.

JOSEPH ODILON SECORD, the defendant, being duly sworn, testified on his own behalf as follows:

Direct Examination.

I am the defendant. I am sixty-eight years old and have lived in Seattle twenty-eight years.

On the 21st of July, 1928, I saw Fletcher and Johnson in my hotel. I never saw Carrothers before; I never saw Murphy before in my life; I never saw Long before. I never sold them liquor.

Room 212 of the Outlook Hotel was occupied by Carl Miller on the 21st of July. He had occupied it for two months. I had no property of mine in the room. As the operator of the hotel I had a

(Testimony of Joseph Odilon Secord.)

pass-key to all of the rooms. The liquor and serving glasses found in room 218 was not mine. I do not know what was found in room 320. The liquor found in that room was not mine. Room 202 was rented to a man named Armstrong. There were broken bottles in room 201.

Q. You heard the testimony that Agent Johnson found a bottle of liquor in your coat pocket and a couple of serving glasses.

A. I was out in the transient rooms and found that in one of [28] the rooms. I didn't know what was in it.

Q. You had just taken it out of the room at the time that the raid was made? A. Yes, sir.

Q. It wasn't your liquor, was it? A. No, sir.

Q. What were you doing with it?

A. I don't know. I wanted to see what it looked like and throw it away.

Q. To dispose of it, throw it away?

A. I find things like that every day.

Cross-examination.

Q. What was the explanation of the liquor found in your pocket?

A. I found that in one of the transient rooms.

Q. The two serving glasses belonged to a transient? A. Yes, sir.

Q. You were doing what with it?

A. I suppose I was going to see what was in it. [29]

COURT'S INSTRUCTIONS TO THE JURY.

There are seven counts in the indictment. One charges sale on the 18th of July, 1928; another on July 20, 1928; and another with sale on the 21st of July; the fourth with possession on the 21st of July, 1928, of certain intoxicating liquor containing the prohibited alcoholic content and being fit for beverage purposes; Count 5 with having been formerly convicted on the 14th day of March, 1921, for having had possession of intoxicating liquor on the 1st day of December, 1920. Then he is further charged with having been convicted on the 9th day of April, 1926, for having had possession of intoxicating liquor on the 1st day of August, 1925. Then he is further charged with maintaining a nuisance at 83 Pike Street, Seattle, Washington, at a place known as the Outlook Hotel, from July 18, to July 21, 1928, by keeping in this building intoxicating liquor for the purpose of sale in violation of the National Prohibition Act.

The defendant has pleaded not guilty to all of the counts in the indictment. That means that he denies them, and the burden of proof is upon the Government, the plaintiff, to show he is guilty beyond every reasonable doubt, and he is presumed innocent until proven guilty by the evidence which has been presented, by the degree of proof which I have indicated.

You are instructed that it is against the law for a person to sell any liquor as charged in this indictment, or to have possession of it; and the law

also provides that where a person has been formerly convicted, then it is the duty of the United States Attorney to charge prior conviction in the indictment, but that is only for one purpose, and that is that the Court, when that is established, shall make the penalty a little more than for the first conviction. [30]

You gentlemen are the sole judges of the facts in the case, and you must determine what the facts are from the evidence presented. You are likewise the sole judges of the credibility of the witnesses, who have testified before you, and in passing upon the credibility of the witnesses and in giving the weight to their testimony, you will take into consideration any evidence and all evidence that has been disclosed upon the trial of the case that would have any bearing upon the truthfulness of the story; and you will take into consideration the appearance of the witnesses upon the witness-stand, the interest they manifested upon the trial, the opportunity of the witnesses for knowing the facts about which they have testified, the interest or lack of interest in the result of this trial, and from all this determine where you believe the truth to lie.

Is there anything in the manner of the witnesses on the part of the Government—they testified to having purchased from the defendant what they call moonshine whiskey, this liquid which the evidence shows contains the prohibited alcoholic content and is fit for beverage purposes. They swore that they bought certain bottles, and bring them into

court, on these various dates; and, likewise, they state they had a search-warrant and found liquor which they have produced here, and which has been admitted in evidence.

The defendant denies that he had this liquor. He had this liquor in his pocket,—you heard what he said. He likewise had those two serving glasses. He told you where he got it. It is immaterial where he got it, if he had it in his possession, he had no right to it. If you believe the witnesses on the part of the Government, that they bought this from the defendant, then the defendant is guilty of every count charged, charging sale; or, if you believe that he had this in his own hand and in his pocket, [31] then he will be guilty of possession of it.

As to the nuisance charge, if this liquor was found in this building, then of course it was in violation of the National Prohibition Act, and he is guilty of maintaining a nuisance, if it was there for the purpose of sale, and, if he made the sale, it was for the purpose of sale.

You will pass upon this case fairly. Is there anything to show that the witnesses on the part of the Government are prejudiced against this defendant, that they lied for the purpose of convicting an innocent man, because, if they did lie, they knew the defendant was innocent, and perjured themselves. Does their testimony sound fair and reasonable. Do all the circumstances disclosed,—the production of the liquor in court, and the relation it bears to all the circumstances detailed, together

with the testimony of the Government agents, impress you as being the truth; if it does give it the weight to which it is entitled, and if it does not you will of course render your verdict accordingly. They are in the employ of the Government,—all of these witnesses except one or two. They are paid a salary. Their compensation does not depend upon conviction, so they are paid just the same whether the defendant is convicted or not. Now, then, were they honestly mistaken, or did they wilfully perjure themselves?

On the other hand, the defendant is interested, because, if he is convicted, he must be punished. Did he then go on the stand and so frame his testimony as to *case* a reasonable doubt with relation to the testimony of the other witnesses. So you will consider this case fairly, and if you entertain a reasonable doubt in your mind, you will resolve that doubt in favor of the defendant and return a verdict of not guilty.

Unless you find the defendant guilty of the possession charge, which would be Count 4, then of course you could not find [32] him guilty of Counts 5 and 6, because Counts 5 and 6 are predicated on Count 4; otherwise these counts do not amount to anything in this case. If the jury finds he was formerly convicted,—and he says he has paid a fine in this court,—if you find him guilty of possession as charged, you can find him guilty of having been formerly convicted, if you believe he was formerly convicted as charged in Counts 5 and 6, as well. If you believe this liquor was for the

purpose of sale, then you will find him guilty of the nuisance count, but if you have a reasonable doubt in any of the counts, it is your duty to return a verdict of not guilty.

A reasonable doubt is just such a doubt as the term implies, a doubt for which you can give a reason; not speculative imaginary or conjectural. The Government does not need to prove the defendant guilty beyond all possibility of doubt, but a reasonable doubt,—such a doubt as the term implies,—such a doubt as a man of prudence, sensibility and decisions, in determining an issue of like concern to himself as that before the jury to the defendant, would make him pause or hesitate in arriving at a conclusion. It is a doubt which is created by the want of evidence, or may be by the evidence itself.

A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged.

This indictment is not evidence. It will be sent to the jury-room simply for you to see what the paper charge is.

Are there any exceptions? I think I have covered the case.

It will require your entire number to agree upon a verdict and when you have agreed you will cause it to be signed by your foreman whom you will elect immediately upon retiring [33] to the jury-room. In the form of verdict there is a blank in which you will write "is" or "not," as you may find.

If you agree before five o'clock I will receive the verdict. If you do not agree before five o'clock, when you do agree the foreman will sign it and put it in an envelope and seal it and put it in his pocket and you will report to the Court at ten o'clock tomorrow morning.

You may retire.

Settled and allowed as a true and correct bill of exceptions in the above-entitled cause, this 12th day of November, 1929.

JEREMIAH NETERER,
District Judge.

O. K.—HAMLET P. DODD,
Asst. U. S. Atty.

Received a copy of the within bill of exceptions this 28 day of Oct., 1929.

ANTHONY SAVAGE,
Attorney for Pltff.

[Endorsed]: Lodged Oct. 28, 1929.

[Endorsed]: Filed Nov. 12, 1929. [34]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 15, 1929, FOR FILING RECORD.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the record on appeal of said cause in the office of the Clerk of the

United States Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 15th day of November, 1929.

Done in open court, this 4th day of November, 1929.

JEREMIAH NETERER,
Judge.

O. K.—ANTHONY SAVAGE,
U. S. Atty.

Nov. 15, 1929.

[Endorsed]: Filed Nov. 4, 1929. [35]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record on appeal in the above-entitled cause, and include therein the following:

1. Indictment.
2. Plea.
3. Verdict.
4. Judgment.
5. Petition for appeal.
6. Order allowing appeal.
7. Appeal and bail bond.
8. Assignment of errors.
9. Notice of appeal.
10. Bill of exceptions.

JOHN F. DORE.

Received a copy of the within praecipe this 30 day of Oct., 1929.

ANTHONY SAVAGE,
Attorney for ————.

[Endorsed]: Filed Oct. 30, 1929. [36]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that this typewritten transcript of record, consisting of pages numbered from 1 to 36, inclusive, is a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on be-

half of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return 67 folios at 15¢	$10.05
Certificate of Clerk to transcript of record, with seal	.50
Appeal fee (Sec. 5 of Act)	5.00
Total,	$15.55

[37]

I hereby certify that the above cost for preparing and certifying record, amounting to $15.55, has been paid to me by the attorney for appellant.

I further certify that I attach hereto and transmit herewith the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District this 12 day of November, 1929.

[Seal] ED. M. LAKIN,
Clerk U. S. District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [38]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America to the United States of America, and to ANTHONY SAVAGE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of appeal, filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said Joseph Odilon Secord is appellant and the United States of America, is respondent, to show cause, if any there be, why judgment in the said writ of appeal mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United

States for the Western District of Washington, Northern Division, this 12 day of November, 1929.

JEREMIAH NETERER,
United States District Judge.

[Seal] Attest: ED. M. LAKIN,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

By S. E. Leitch,
Deputy.

[Endorsed]: Filed Nov. 12, 1929. [39]

[Endorsed]: No. 6171. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Odilon Secord, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 21, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6171

JOSEPH ODILON SECORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

ANTHONY SAVAGE
United States Attorney

HAMLET P. DODD AND CAMERON SHERWOOD
Assistant United States Attorney
Attorneys for Appellee

Office and Postoffice Address:
307 Federal Building, Seattle, Washington

SUBJECT INDEX

TABLE OF CASES CITED

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6171

JOSEPH ODILON SECORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case.

ARGUMENT

It is asserted in the first assignment that the Court erred in permitting cross-examination of ap-

pellant as to prior convictions. However, this claim of error is not argued in the brief of appellant, nor was an exception taken at the time of trial. (Tr. 14.) The assignment is without merit, particularly when the Government had already proved the prior convictions by its own witnesses. (Tr. 23 to 25.)

Such cross-examination is proper.

Smith v. U. S., 10 Fed. (2nd) 787 (C. C. A. 9);

Merrill v. U. S., 6 Fed. (2nd) 120, (C. C. A. 9).

Reception of evidence without objection and exception or motion to exclude is not reviewable.

Meyers v. U. S., 36 Fed. (2nd) 859;

Alvarado v. U. S., 9 Fed. (2nd) 385, (C. C. A. 9);

Sullivan v. U. S., 32 Fed. (2nd) 992.

The remaining four assignments all pertain to instructions of the Court claimed to give ground for reversible error. Appellant failed to note exceptions to the charge or any portion of it, nor did he request additional instructions. (Tr. 27 to 32.)

In the absence of an exception, assignments of error respecting the charge of the Court cannot be considered on appeal.

Smith v. U. S., 41 Fed. (2nd) 215;

Grillo v. U. S., 42 Fed. (2nd) 451;

Turner v. U. S., 32 Fed. (2nd) 126;

Blair v. U. S., 32 Fed. (2nd) 130;

Reger v. U. S., 37 Fed. (2nd) 74;

Sawyear v. U. S., 27 Fed. (2nd) 569, (C. C. A. 9);

DeBellis v. U. S., 22 Fed. (2nd) 948;

Cefalu v. U. S., 37 Fed. (2nd) 867.

Failure to charge the jury on specific principles of law cannot be complained of where the attention of the Court is not called to the omission.

Carroll v. U. S., 39 Fed. (2nd) 414.

Of the four assignments pertaining to instructions (which the Government contends should not be considered because of failure to note exceptions) the first is not argued in the brief.

Assignments III and IV affect instructions given with respect to evidence offered by the Government to uphold the possession count.

Physical possession of intoxicating liquor, unexplained, is prima facie evidence of ownership.

Melby v. U. S., 28 Fed. (2nd) 613 (C. C. A. 9).

As the transcript reveals, appellant thrice sold liquor to officers, the last sale being on the same day he was found in possession of liquor. (Tr. 19-21.) The defendant admitted that liquor found in two rooms of his hotel was his. (Tr. 21.) An officer took a pint bottle partially filled with whiskey from appellant's person when he was arrested. (Tr. 20.) He wanted to "fix it up" with the arresting officers. (Tr. 22.)

It would seem, in view of the overwhelming testimony tending to show unlawful possession of liquor by appellant, that he was in no manner prejudiced, assuming he was entitled to an unrequested instruction tending to bear out his "theory" of the case. Certainly his rather meretricious explanation (Tr. 26) that he found the liquor in a room; that it did not belong to him; that he "wanted to see what it looked like and throw it away" and that he supposed he "was going to see what was in it," in view of the incriminating circumstances, did not require the Court of its own motion to instruct the jury in accord with such a defense.

No substantial rights of appellant were thus affected.

Brown v. U. S., 9 Fed. (2nd) 589 (C. C. A. 9);

Carroll v. U. S., 39 Fed. (2nd) 414.

Assignment V asserts error as to an instruction as to nuisance. No exception was taken. No request for further instruction respecting the nuisance count was made. Therefore, error cannot be thus predicated.

Carroll v. U. S. (*supra*).

Appellant argues in his brief (page 7) a matter not assigned as error. Assuming this Court will consider alleged error without proper assignment, the contention argued is without foundation.

A Government agent was cross-examined by appellant as to the whereabouts of one Davis, an informer who assisted the agent in buying liquor from appellant on one occasion. Objection by the Government was sustained with the Court's proviso that if Davis was not produced as a witness, the jury would be instructed with respect to his absence. (Tr. 18-19.) Davis did not testify later, but appellant did not call the matter to the Court's attention. Testimony by Davis, if he had appeared, would have been merely cumulative. (Tr. 18.)

The failure to call Davis did not create an inference that his testimony would have been unfavorable to the prosecution.

"The rule has been much misunderstood, and is often misapplied. It does not obtain when the uncalled witness is purely cumulative, and when he was not in a better position to know the facts than those who were called."

DeGregorio v. U. S., 7 Fed. (2nd) 295.

Trial errors should be disregarded by an appellate court where the verdict is plainly the only one which the jury could rightly render.

Robinson v. U. S., 30 Fed. (2nd) 25;

White v. U. S., 30 Fed. (2nd) 590.

It is respectfully submitted that there is no substantial error in the record and that the guilt of appellant on all counts was abundantly proved beyond a reasonable doubt.

Respectfully submitted,

ANTHONY SAVAGE,
United States Attorney,

HAMLET P. DODD, and
CAMERON SHERWOOD,
Assistant United States Attorneys,

Attorneys for Appellee.

No. 6172

United States
Circuit Court of Appeals
For the Ninth Circuit.

NG MON TONG,

Appellant,

vs.

LUTHER WEEDIN, United States Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Filmer Bros. Co. Print, 330 Jackson St., S F., Cal.

No. 6172

United States

Circuit Court of Appeals

For the Ninth Circuit.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

Mr. S. A. KEENAN, Attorney for Appellant,
458 Empire Building, Seattle, Washington.

Mr. ANTHONY SAVAGE and Mr. HAMLET P. DODD, Attorneys for Appellee,
310 Federal Building, Seattle, Washington.
[1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20,362.

In the Matter of the Application of NG MON TONG for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division:

The petition of Ng Mon Tong respectfully shows to this court:

That said Ng Mon Tong is confined and restrained of his liberty at the Immigration Station at the City of Seattle, State of Washington, by Luther Weedin, United States Commissioner of Immigration, under and by virtue of an order of de-

*Page-number appearing at the foot of page of original certified Transcript of Record.

portation by James J. Davis, Secretary of Labor of the United States, which order of deportation directs that petitioner be deported to the Republic of China. That said order of deportation was and is void and contrary to law, and this petitioner is illegally confined and restrained of his liberty thereunder for the following reasons:

I.

That petitioner is of the age of thirteen years and was born in the now Republic of China. That petitioner's father, one Ng Ngin, is a native-born citizen of the United States of America, and this petitioner is a citizen of the United States of America.

II.

That on or about the 30th day of December, 1929, this petitioner landed at the Port of Seattle, State of Washington, en route from the Republic of China, and was then and there and ever [2] since has been held and detained by said Immigration Commissioner. That after inquiry and examination before said Commissioner of Immigration petitioner was denied admission to the United States by said Commissioner from which decision petitioner appealed to the Secretary of Labor of the United States, which appeal was dismissed and petitioner ordered to be deported to the Republic of China.

III.

That the evidence taken before the Board of Inquiry in the matter of the application of petitioner

to land in the United States shows that petitioner is a citizen of the United States, and there was no evidence taken before said Board that petitioner was not a citizen of the United States. That the order denying petitioner admission into the United States and the said order of deportation was and is contrary to the law and the evidence.

WHEREFORE, petitioner prays that this Honorable Court order that a writ of habeas corpus issue from this court directed to the said Luther Weedin, Commissioner of Immigration at Seattle, Washington, commanding him forthwith to produce the body of petitioner before this court then and there to inquire into the legality of his detention, or, in the alternative, that this court issue its order commanding the said Commissioner of Immigration to show cause at a time and place to be fixed by the court, why said writ of habeas corpus should not issue.

And that petitioner be restored to his liberty.

S. A. KEENAN,
Attorney for Petitioner.

State of Washington,
County of King,—ss.

Ng Mon Tong, being first duly sworn on oath, deposes and says: That he is the petitioner named in the foregoing petition for a writ of habeas corpus; that he has read the said petition, knows the contents thereof and believes the same to be true.

NG MON TONG,
(In Chinese Characters.)

Subscribed and sworn to before me this 30th day of April, 1930.

[Notary's Seal] S. A. KEENAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Apr. 30, 1930. [3]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

This matter coming on regularly to be heard upon the motion of S. A. Keenan, attorney for the petitioner, Ng Mon Tong, for an order directed to Luther Weedin, United States Commissioner of Immigration at Seattle, State of Washington, commanding him, the said Commissioner of Immigration, to show cause, if any he have, why a writ of habeas corpus should not issue out of this court commanding him to have the body of Ng Mon Tong before this court then and there to inquire into the legality of his detention by said commissioner, and it appearing from the petition of the said Ng Mon Tong that he is illegally and unlawfully detained and restrained of his liberty by the said Commissioner of Immigration at the Immigration Station, in the City of Seattle, State of Washington, and the law and the premises being by the court duly considered,—

IT IS ORDERED AND ADJUDGED that the above-named Luther Weedin, United States Com-

missioner of Immigration at Seattle, Washington, show cause, if any he have, before this court on the 12th day of May, 1930, at ten o'clock in the forenoon of said day, why a writ of habeas corpus should not issue from this court commanding him, the said Luther Weedin, Commissioner as aforesaid, to produce the body of said Ng Mon Tong before this court, at a time and place to be fixed by the court, then and there to inquire into the legality of his caption and detention.

Done in open court this 30th day of April, 1930.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Apr. 30, 1930. [4]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington:

Comes now the respondent, Luther Weedin, United States Commissioner of Immigration at the port of Seattle, Washington, and for answer and return to the order to show cause entered herein certifies and shows to this court that the petitioner, Ng Mon Tong, was detained by the said United States Commissioner of Immigration at the time he arrived at the port of Seattle, Washington,

to wit: December 30, 1929, as an alien Chinese person not entitled to admission into the United States under the laws of the United States, pending a decision on his application for admission as a citizen of the United States by virtue of being a foreign-born son of Ng Ngin, a native-born citizen of this country; that, after a hearing before a legally constituted Board of Special Inquiry at the Seattle, Washington, Immigration Station, the application of the said Ng Mon Tong for admission into the United States was denied by the said Board of Special Inquiry for the reason that his claim to be a son of Ng Ngin had not been satisfactorily established; and for the further reasons that he was an alien not in possession of an unexpired immigration visa, and was an alien ineligible to citizenship coming to the United States in violation of Section 13 (c) of the Immigration Act of 1924; that the said Ng Mon Tong appealed from the decision of the Board of Special Inquiry to the Secretary of Labor; that his appeal was dismissed by the Secretary [5] of Labor and his return to China directed; that, since the final decision of the Secretary of Labor, this respondent has held, and now holds and detains, the said Ng Mon Tong for deportation to China as an alien Chinese person not entitled to admission into the United States under the laws of the United States, and subject to deportation to China under the laws of the United States.

The original record of the Department of Labor and all exhibits, both on the hearing before the Board of Special Inquiry at the Seattle, Washing-

ton, Immigration Station and on the submission of the record on the appeal to the Secretary of Labor, in the matter of the application of Ng Mon Tong for admission into the United States, are attached hereto and made a part and parcel of this return, as fully and completely as though set forth herein in detail.

WHEREFORE, respondent prays that the petition for a writ of habeas corpus be denied.

LUTHER WEEDIN.

United States of America,
Western District of Washington,
Northern Division,—ss.

Luther Weedin, being first duly sworn, on oath deposes and says: That he is United States Commissioner of Immigration at the port of Seattle, Washington, and the respondent named in the foregoing return; that he has read the foregoing return, knows the contents thereof and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 6th day of May, 1930.

[Notary's Seal] D. L. YOUNG,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

[Endorsed]: Filed May 9, 1930. [6]

[Title of Court and Cause.]

DECISION.

May 26, 1930.

S. A. KEENAN, Attorney for Petitioner.

ANTHONY SAVAGE, U. S. Attorney, HAMLET P. DODD, Asst. U. S. Attorney, JOHN F. DUNTON, U. S. Immigration Service, on the Brief, Attorneys for Respondent.

NETERER, District Judge.—An examination of the entire record in this case forces the conclusion that the writ must be denied. The court can only interfere in such cases of flagrant disregard of fundamental principles of justice as constitute a denial of due process. The jurisdiction of the court is limited to ascertain whether there is any evidence to support the conclusion of the Department of Labor, and not whether the court would come to the same conclusion in passing upon the testimony produced. The conclusion of the immigration authorities is binding upon the court, and unless there is no evidence, its jurisdiction ends.

The petitioner on his arrival here claimed to be twelve years and about one month of age. He could not be older and come within any of the testimony to show his filial relationship. The photograph taken by the Department on his arrival, which is in the record, shows a boy much more than twelve years of age. The certificate of the doctor is in the record, that he made an examination of

the teeth, sexual development and general appearance, which shows that he was not less than seventeen years of age. The members of the Board saw and observed the petitioner and each [7] expressed an opinion, which is in the record, that the petitioner was not less than seventeen—one said sixteen—years of age. It may be recognized as common knowledge that the physical changes in an individual between twelve and sixteen years are perhaps greater and more perceptible than during any other period of development, except during infancy. It is the puberty age where the individual transforms from one physical status into another; and this is especially pronounced with relation to sex attributes. There is not so much disagreement with relation to family history and relation in the testimony as in some cases, and yet there is disagreement which should not obtain if the relation of father and son obtains. There is likewise disagreement as to physical surroundings which would appear to be more than inadvertent, or slips of memory, the petitioner testifying one way and the alleged father and an alleged brother testifying the other way. Without further analysis or discussion, the petition will be denied.

NETERER,
United States District Judge.

[Endorsed]: Filed May 26, 1930. [8]

In the United States District Court for the Western District of Washington, Northern Division.

No. 20,362.

In the Matter of the Application of NG MON TONG for Writ of Habeas Corpus.

JUDGMENT AND ORDER.

This cause having duly come on for hearing before this court on the 12th day of May, 1930, on the return of the United States Commissioner of Immigration to the order to show cause theretofore entered herein, the respective parties being represented by their attorneys of record, S. A. Keenan for the petitioner, and Anthony Savage and Hamlet P. Dodd, United States Attorney and Assistant United States Attorney, respectively, for the respondent, and the Court, being fully advised in the premises, having on the 26th day of May, 1930, signed and entered herein its written opinion directing the denial of the petition,—

NOW, THEREFORE, it is by this Court ORDERED, ADJUDGED AND DECREED that the writ of habeas corpus as prayed for be, and the same is hereby, DENIED, and that the said Ng Mon Tong be deported to China; provided, however, that he may within five days file notice of appeal and, in the event that the appeal be taken, the United States Commissioner of Immigration at the port of Seattle, Washington, shall be, and he hereby is, restrained from deporting the said Ng

Mon Tong until hearing and decision on such appeal by the United States Circuit Court of Appeals for the Ninth Circuit, or by the United States Supreme Court in the event the cause be taken to that court on appeal. Notice of this order to be given by mail forthwith by the U. S. Atty.

Done in open court this 2d day of June, 1930.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Jun. 2, 1930. [9]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Hon. LUTHER WEEDIN, United States Commissioner of Immigration for the Port of Seattle, and to ANTHONY SAVAGE and HAMLET P. DODD, His Attorneys:

You and each of you are hereby notified that Ng Mon Tong applicant above named, hereby and now appeals from that certain order, judgment and decree made herein by the above-entitled court on June 2, 1930, adjudging and holding that the above-named petitioner be denied a writ of habeas corpus, and from the whole thereof, to the *United Circuit* Court of Appeals for the Ninth Judicial Circuit.

Dated this 9th day of June, 1930.

S. A. KEENAN,
Attorney for Appellant.

Received a copy of the within notice this 9th day of June, 1930.

ANTHONY SAVAGE,
Attorney for Respondent.

[Endorsed]: Filed Jun. 9, 1930. [10]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Ng Mon Tong, the applicant above named, deeming himself aggrieved by the order and judgment entered herein on the 2d day of June, 1930, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript and record of the proceedings and papers upon which said order and judgment is made, fully authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States.

And said petitioner respectfully prays this Honorable Court that this petition for appeal may be granted.

Dated this 2d day of June, 1930.

S. A. KEENAN,
Attorney for Appellant.

[Endorsed]: Filed Jun. 9, 1930. [11]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes said applicant and states that the Court erred in the following particulars in denying to applicant a writ of habeas corpus as prayed for:

1. The Court erred in holding and deciding that a writ of habeas corpus should be denied applicant herein.

2. The Court erred in holding that there is any evidence in the record whatever substantiating the findings of the Commissioner of Immigration in holding that the applicant is not the son of Ng Ngin.

3. The Court erred in sustaining each and all of the findings of the Commissioner of Immigration upon which he *denied admission* into this country as a citizen of the United States.

4. The Court erred in holding that the applicant, Ng Mon Tong was not eligible for admission to the United States.

5. The Court erred in refusing to hold that this applicant was denied a fair and impartial hearing.

Dated this 9th day of June, 1930.

S. A. KEENAN,
Attorney for Appellant and Applicant.

[Endorsed]: Filed Jun. 9, 1930. [12]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon filing and reading of the petition for appeal in the above-entitled matter and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED that the appeal be allowed as prayed for; conditioned upon the applicant filing a good and sufficient bond in this cause in the penal sum of $250, with the usual conditions of appeal bonds from this court and with a further condition that applicant will reimburse United States for all costs and expenses for his maintenance during the pendency of this appeal.

Dated this 9th day of June, 1930.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jun. 9, 1930. [13]

UNITED STATES FIDELITY AND GUARANTY COMPANY,
BALTIMORE, MARYLAND.

No. ——. $250.00

[Title of Court and Cause.]

APPEAL BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, NG MON TONG, as principal, and the

United States Fidelity & Guaranty Company, a corporation of Baltimore, Maryland, as surety, jointly and severally acknowledge ourselves to be indebted unto the United States of America in the sum of Two Hundred Fifty and no/100 ($250.00) Dollars, lawful money of the United States of America, under the following conditions:

WHEREAS, lately in the District Court of the United States for the Western District of Washington, Northern Division, in a petition by Ng Mon Tong for a writ of habeas corpus, a certain judgment and order of deportation dated June 2, 1930, was made and entered denying petitioner's application for a writ of habeas corpus and ordering him deported and petitioner has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco in said Circuit to reverse said judgment and order of deportation.

NOW, THEREFORE, the condition of the above obligation is such that if the said Ng Mon Tong shall prosecute his appeal to effect and answer all costs if they fail to make their plea good, together with all costs and expenses for his maintenance during the pending of this appeal, then this obligation to be void, otherwise to remain in full force and effect.

Signed, sealed and delivered this 9th day of May, A. D. 1930.

NG MON TONG,
By S. A. KEENAN,
His Atty.,
Principal.

UNITED STATES FIDELITY & GUARANTY COMPANY,
[Seal] By C. H. CAMPBELL,
Attorney-in-Fact.

Approved June 16, 1390.

NETERER,
Judge.

[Endorsed]: Filed Jun. 16, 1930. [14]

[Title of Court and Cause.]

STIPULATION RE ORIGINAL EXHIBITS.

It is hereby stipulated and agreed by and between the United States District Attorney for the Government, and S. A. Keenan, attorney for applicant and appellant, that the evidence, exhibits, and the record made before the Commissioner of Immigration for the port of Seattle, as well as the orders and decisions of the Commissioner of Labor, be transmitted with the record on appeal without being transcribed; and it is further stipulated that both parties to this action waive the necessity of printing of said record made before Commissioner of Immigration as well as said exhibits in the United States Circuit Court of Appeals.

Dated at Seattle, this 9th day of June, 1930.

JEFFREY HEIMAN,
Asst. United States District Attorney.

S. A. KEENAN,
Attorney for Applicant and Appellee.

_____,
Acting Commissioner.

[Endorsed]: Filed Jun. 9, 1930. [15]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD.

Upon reading and considering the stipulation in this case relative to the transmission of the record to the Circuit Court of Appeals, this day filed,—

IT IS HEREBY ORDERED that the Clerk of this court may transmit to the Clerk of the Circuit Court of Appeals the original records, including all exhibits, used on the hearing before the Commissioner of Immigration for the port of Seattle and that he need not make a transcript of the same or any part thereof.

Dated at Seattle, Washington, this 9th day of June, 1930.

JEREMIAH NETERER,
Judge.

S. A. KEENAN,
Acting Commissioner.

[Endorsed]: Filed Jun. 9, 1930. [16]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said United States District Court:

You will please, in the preparation of the record on appeal in this case, include in that record:

1. The record from the Commissioner of Immigration, filed in this court, including all evidence, exhibits, and the record made before the Commissioner of Immigration for the port of Seattle, as well as the orders and decisions of the Commissioner of Labor, as per stipulation.
2. Petition for a writ of habeas corpus.
3. Order to show cause.
4. Return to order to show cause.
5. Decision of the Court on the application for writ.
6. Order denying writ of habeas corpus.
7. Petition for appeal.
8. Notice of appeal.
9. Order allowing appeal.
10. Assignment of errors.
11. Citation.
12. Order for transmission of original record.
13. This praecipe.
14. Stipulation.
15. Appeal bond.

S. A. KEENAN,
Attorney for Applicant.

[Endorsed]: Filed Jun. 10, 1930. [17]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 17, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel, filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [18]

Clerk's fees (Act Feb. 11, 1925), for making record, certificate or return, 25 folios at 15¢ $3.75
Certificate of Clerk to Transcript of Record .. .50
Certificate of Clerk to Original Exhibits ..... .50
Appeal fee, Section 5 of Act 5.00

Total $9.75

I hereby certify that the above cost for preparing and certifying record, amounting to $9.75, has been paid to me by the attorney for appellant.

I further certify that I attach hereto and transmit herewith the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District this 19 day of June, 1930.

[Seal] ED. M. LAKIN,
Clerk U. S. District Court, Western District of Washington.

By I. W. Egger,
Deputy. [19]

[Title of Court and Cause.]

CITATION.

United States of America,—ss.

To the Honorable LUTHER WEEDIN, United States Commissioner of Immigration at the Port of Seattle, Washington, GREETING:

WHEREAS, Ng Mon Tong has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment, order and decree lately, on, to wit, the 2d day of June, 1930, rendered in the District Court of the United States for the Western District of Washington, made in favor of you, adjudging and decreeing that the writ of habeas corpus as prayed for in the petition herein be denied.

You are therefore cited to appear before the United States Circuit Court of Appeals, in the city of San Francisco, State of California, within the time fixed by statute, to do and receive what may obtain to justice to be done in the premises.

Given under my hand in the City of Seattle, in the Ninth Circuit, the 9th day of June, 1930, in the year of our Lord nineteen hundred thirty, and of the Independence of the United States the one hundred fifty-fourth.

June 9th, 1930.

[Seal] JEREMIAH NETERER,
Judge.

Received a copy of the within citation this 9 day of June, 1930.

ANTHONY SAVAGE,
Attorney for Respondent.

[Endorsed]: Filed Jun. 9, 1930. [20]

[Endorsed]: No. 6172. United States Circuit Court of Appeals for the Ninth Circuit. Ng Mon Tong, Appellant, vs. Luther Weedin, United States Commissioner of Immigration at the Port of Seattle, Washington, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 23, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 6172

NG MON TONG,

Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge.*

Brief of Appellant

S. A. KEENAN,
E. P. DONNELLY,
Attorneys for Appellant.

458 Empire Building,
Seattle, Washington.

MARTIN & DICKSON, *Printers*

INDEX

CASES CITED

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 6172

NG MON TONG,

Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge.*

Brief of Appellant

STATEMENT

Appellant applies for admission to the United States as a Chinese-born son of an American citizen. The evidence produced before the special examiners, conclusively establishes his right to admission under the laws and regulations of the United States. And that evidence stands unquestioned and unimpeached by any evidence or circumstances appearing in the

record. Appellant feels that the denial of his application by the Special Board is an arbitrary ruling, unsupported except by the suspicion and prejudice of the members of the Board.

Applicant's witnesses, his father Ng Ngin, and prior-landed brother, Ng Mon Won, were examined at Houston, Texas, on January 20, and 21; without any apparent cause therefor, the record was returned to Texas for the re-examination of these witnesses, which occurred February 26, 1930. When the second examination was ordered by the Seattle Board, the Houston Board was directed to put to the father and the prior-landed son, the exact questions propounded to the applicant in Seattle. These witnesses were again subjected to a most rigid examination, obviously for the purpose of developing discrepancies.

We would be very pleased to have the court read the report of the examining inspector in this last examination at Houston, Texas; it is found on pages 35 and 36 of the written record. This report clearly shows that no material discrepancies occurred between the last and the first examination of these witnesses, and that report closes with this very pertinent statement:

> "With the foregoing, it is believed that the primary discrepancies heretofore shown to exist have been accounted for or duly explained."

Surely, that voluntary statement, over the signature of the immigrant inspector, who examined the witnesses and had the opportunity to observe their demeanor and actions on the witness stand, is of more force and effect than the suspicions and conjectures of the members of the Seattle Board, who never saw or heard either of the witnesses, and who condemned them as deceivers and frauds.

THIS APPLICATION WAS FIRST SUBMITTED TO A SPECIAL BOARD AT SEATTLE, WASHINGTON, JANUARY 6, 1930, composed of Inspector W. E. Ainsley, Chairman, Inspector H. G. Hall, member, and Isabella M. Oliver, stenographer. This Board forwarded the record to Houston, Texas, for the purpose of taking the testimony of the father and prior-landed son. Upon receipt of these records by the Seattle office, they were again forwarded to Houston, Texas, where the father and prior-landed son were re-examined; thereafter the record with the re-examination, was returned to the Seattle Immigration Office March 13, 1930. (See page 15, Chairman's Final Findings and Order.)

Some time prior to the return of this re-examination, the special Board of Investigation withdrew from the case, voluntarily or involuntarily, we cannot say; it is disclosed in the record somewhere that the Chairman of the first Board was transferred to another Immigration Station.

On page 9 of the last portion of the special board's record, will be found a record of the first proceedings of the second special Board of Investigation assigned to this case, R. M. Porter, Chairman, R. C. Matterson, member, Francis M. Miller, typist, "in lieu of former Board * * * none of whom are available." It will be observed that this new Board went into session for the consideration of this case for the first time on March 14, 1930, the voluminous record having arrived from Texas the day before. The hearing was closed on that date, the Chairman's lengthy report is dated the next day, March 15, 1930. These dates are indisputable evidence of the fact that this large record was not read and considered by the members of this Board at any time, or at all, before the Chairman wrote up and signed his Findings.

Quite evidently this new Board, having decided to arbitrarily deny the application, the Chairman sought out enough of the record to justify, as he imagined, his Conclusions and Findings, for the rejection of the applicant. This circumstance alone, justifies the claim that this applicant has not had a fair and unbiased trial by a whole Board of Special Investigation as required by the law.

This applicant claims to be the son of an American-born citizen, and as such, has the right to come into

and live in the United States as a citizen of this nation. Upon complying with certain formalities, as was done in this particular case, the applicant is entitled to a fair and just hearing and conscientious consideration of his testimony and the testimony of his witnesses. The last Board has not accorded to him that kind of a hearing and consideration.

ASSIGNMENT OF ERRORS

1. The Court erred in holding and deciding that a writ of habeas corpus should be denied applicant herein.

2. The Court erred in holding that there is any evidence in the record whatever substantiating the findings of the Commissioner of Immigration in holding that the applicant is not the son of Ng Ngin.

3. The Court erred in sustaining each and all of the findings of the Commissioner of Immigration upon which he denied applicant admission into this country as a citizen of the United States.

4. The Court erred in refusing to hold that this appellant was denied a fair and impartial hearing.

ARGUMENT

The Board who first entered upon the investigation of this case were evidently not satisfied with the testimony concerning the applicant's place of birth,

nor with his testimony concerning the village of his birth, nor with his description of the family of which he claimed to be a member. In consequence of which, that Board returned the record to Texas for the purpose of having applicant's father and landed brother re-examined as to all the conditions, circumstances and transactions regarding the family and the village.

It is worthy of note that after a most rigid examination of the father and the landed brother, based upon substantially the same questions propounded to the applicant, no material discrepancies are pointed out. Anyone accustomed to considering the testimony of witnesses, must be impressed with the frankness of the witnesses and with the guileless manner in which all the information was given that the inspector requested.

And notwithstanding the evident feeling of suspicion of the Special Board that made the Findings, the Chairman thereof, in his final report states:

> "A close study and comparison of the testimony of alleged father and prior-landed brother taken at Houston, Texas, Jan. 20, 1930, and Feb. 26, 1930, and testimony of applicant on original examination and upon recall, leave no doubt in the minds of the members of the Board that applicant is a resident of the same village as the alleged father and prior-landed brother."

Then follows the suggestions that discrepancies in the testimony of the three witnesses might indicate that the applicant was not a member of the same household.

Then on pages 16 and 17 the Chairman sets out eight discrepancies that he thinks justify the doubt of the applicant being a member of the same household as the father and prior-landed brother. Without taking the space or the time to discuss, at length, each of the eight points, we make the broad statement that not one of them is at all material in ascertaining the question involved in the inquiry: Is the applicant the son of an American-born Chinese? The matter of these discrepancies are not seriously urged, by the Immigration Bureau, against the application for the writ in this case.

For instance, the Chairman of the Board in his first specification, complains because the applicant is not able to give the correct names of his grandfather and other ancestors. He answered these questions as intelligently as any person of his age would ordinarily do. It is true that the father says he was home in China when the youngest son was born. This applicant testified positively that the child was born two or three months after the father left. Surely, because this boy may have made a mistake as to when his

father left in relation to the birth of the last child, it cannot be urged as a reason for denying his admission to this country, nor to discredit his testimony. If this applicant, as this last Board indicated, was deceiving the Board and perjuring himself, he would not have answered this question so firmly and so positively. The answers are not the answers of a liar. He was just mistaken.

The same observation is true as to specification No. 6. There, the father and landed son, when the father was in China the last time, took a joint trip to Hongkong, where they were gone for some days.

This boy, applicant, in his testimony, on re-examination, testified:

"Q. Did your older brother Ng Mon Won accompany your father to Houkgonk when your father returned to the U. S.? A. No.

Q. How is it that your father and brother Ng Mon Won both describe a trip that they made to Hongkong and were gone from the village two or three weeks, and you seem to know nothing about it? A. My father never took Ng Mon Won to Hongkong."

These answers are not hedged in as is customarily done by those who testify falsely. He testified exactly as any American boy of that age would have testified in the same circumstance. The reason for his lack of knowledge concerning that trip is quite apparent to

any father of three or four boys of that age. This applicant's father and oldest brother, evidently had agreed upon that trip; perhaps they told this applicant and his twin brother, in the presence of the mother, that they were going some other place nearby. By so doing this applicant and his twin brother were pacified. Whereas, if they knew that the father and this oldest brother were going to Hongkong they also would insist upon going, or the ordinary consequences would follow to the great annoyance of the mother and two younger children.

The other inconsistencies are limited to some minor descriptions of the village, the location of the railroad station and floors and windows in the schoolhouse.

Therefore, the investigating board might as well have frankly conceded that their only reason for excluding this applicant is his age. Just a year prior to this applicant's examination, his landed brother was examined here in Seattle and duly and regularly admitted as the blood son of this applicant's father.

Applicant's Age.—Applicant's father and his oldest brother testified positively to the applicant's age —about fourteen years. As against this positive testimony, there is not one word offered in contradiction of it. The Board's Finding of a greater age is based en-

tirely upon their individual opinions and the opinion of a doctor connected with the Immigration Service here in Seattle. From their individual opinions as to the age of this applicant and a written statement by this doctor, they establish, in their judgment, the positive fact that this applicant cannot be the son of the alleged father.

We respectfully contend that such a conclusion is not justified in law. Furthermore, the record refutes any such inference.

Just before the close of the re-examination of the applicant on March 14, 1930, each member of the Board had his guess as to the applicant's age recorded.

"Chairman (to Inspector Matterson): What age would you judge this applicant to be?

A. (By Inspector Matterson.) From the height and general appearance of applicant, his manner of testifying, and the fact that his voice is heavy like a boy who has passed the age of puberty, I believe him to be between seventeen and twenty years of age, American reckoning.

Chairman (To Clerk Miller): What is your opinion in regard to the age of applicant?

A. (By Clerk Miller.) I would estimate him to be not less than sixteen years of age by American reckoning, and not more than twenty years.

By Chairman: Judging from the general appearance of applicant and his manner of speech, I believe him to be not less than seventeen years

of age and not more than twenty-one years of age."

And this is the statement of Dr. Bailey:

"Commissioner of Immigration
Seattle, Washington.
"Sir:

"In regard to the case of Ng Mon Tong, which was referred to me for my opinion as to his approximate age, judging from his general appearance, teeth and sexual development, I am of the opinion that he is between 17 and 22 years of age.

"Respectfully,
A. R. BAILEY,
A. A. Surgeon."

Dr. Bailey does not even taken the chance to certify to this statement. He was not present at the hearing.

Such an *ex parte* statement would not be received as evidence for any purpose in any court or Board of Inquiry anywhere in America. The most valuable right that any human being can claim is involved in this hearing. Congress never intended that that right should be dependent upon such speculative and impulsive guesses.

As stated by Circuit Judge Anderson in *Johnson vs. Damon,* 16 Fed. (2d), 65:

"The mind revolts against such methods of dealing with vital human rights."

In that case, the Special Board made the order of exclusion upon so-called discrepancies in the testimony.

We shall now direct the court's attention to what the record discloses as to the age of this applicant. The father lived in this country thirty years before returning to China and marrying for the first time in 1911. He returned to the Port of San Francisco from China, May, 1913. Before he returned from that first trip, the oldest son, now living here, was born, the only child born during the two years of his married life.

On December 22, 1916, he again visited China, going through the Port of San Francisco as an American citizen. He returned to this country on May 17, 1919, at which time he described his wife and oldest son as he had in May, 1913, and stated that he had two sons born during this second trip, describing them as twins, Ng Mon Tung and Ng Mon Park, three years old. It will be noted that upon his return and in his written report to the Immigration Station in San Francisco, he gave the age of these twins, one of them this applicant, as three years in May, 1919, so they must have been ten years older in May, 1929, and no doubt, in January, 1930, when the first examination was had, they must have been in their fourteenth year. This conclusion is warranted by the applicant's own

testimony when he was describing his school attendance in his native village.

> "Describe your school experience. A. I started when I was 10 years old in the Woon Hen Doon schoolhouse in our village. I was there continually until a few days before I left home for this country.
>
> Q. How long altogether have you attended school? A. Four years, altogether.
>
> Q. What was the name of the teacher you had when you went to school with your older brother, Mon Won, that year? A. Wong Yow Hong, he was the only teacher who taught in that school.
>
> He still teaches there."

This information was given when the applicant had no thought of specifying his exact age. Other incidents which appear in the brothers testimony and the father's testimony clearly indicate that at the time this applicant was examined by the Board, and the statement made by Dr. Bailey, he was somewhere between fourteen and fifteen years of age.

All persons familiar with the testimony of Chinese as to their ages and to exact dates, recognize the difficulty in having the Chinese method of figuring dates and time harmonize with Western methods.

This Board, as well as the courts generally, also recognize the fact that strong, healthy Oriental chil-

dren arrive at the age of puberty much earlier than American children; and furthermore, that it is very difficult for an Occidental to ascertain the age of Chinese or Japanese by merely talking to and looking at them.

The applicant's answers to the questions propounded to him in this record plainly disclose that the answers came from an immature and youthful person. The writer, met and observed this applicant on three different occasions, observed his voice and his manner in replying to the questions propounded by the interpreter, as well as his walk, movements and mannerisms. His swinging gait, the movement of his body, of his hands, his arms and his legs indisputably branded him a young, awkward boy. It is true, that he seems tall; he has very, very thick jet black hair. The movements and muscles of his face and mouth clearly indicate his youth.

It must not be overlooked that the actual age of this applicant, on this hearing, is not so material. Under the statute he was entitled to be admitted immediately after he was born, if he was then eligible; that right remains with him so long as he lives. This collateral question, can only be considered as bearing upon the credence to be given to the testimony of the father and the applicant. If it is established by the

record that this applicant is the blood son of the father, an American citizen, even if the father and the applicant recklessly or unintentionally misstated the age of the applicant, that would not deprive him of his rights to enter this country as an American citizen.

We concede that many cases have appeared in the District and the Circuit courts involving the denial of admission to this country by Chinese who were older than they claimed to be. By examination, it will be discovered that practically all of these cases under the statute permitting minor children of Chinese merchants to come into this country as such minors. In these cases the exact age of the minor is the entire issue and question involved on the hearing; it is a jurisdictional point. This condition does not obtain in this case.

There is no substantial evidence to be found in the record justifying the conclusion that this applicant is older than he, his father and brother testified to. The Chairman of the Special Board of Inquiry expressed the opinion that the applicant was not less than seventeen years and not more than twenty-one years; the other inspector gave the opinion that the applicant was between the ages of seventeen and twenty; the clerk gave the opinion that the applicant was not less

than sixteen years and not more than twenty years; and the doctor, in his letter, stated that he thought the applicant was between seventeen and twenty-two years of age.

Surely, this applicant's rights cannot be dependent upon these four guesses, each guess different from the other three, not one of the guesses venturing to state the age nearer than three or four years; the doctor's range is five years.

CITATIONS

When it is held that these guesses may not be considered as evidence, then, it necessarily follows, that there is no evidence whatsoever in the entire record justifying the Findings of the Board in this case; it would appear that the opinion of the Circuit Court, this Circuit, written by Justice Gilbert, in *Woo Hoo vs. White,* 156 C. C. A., 239, is very applicable to this particular question; in that opinion the court decided:

> "The doubt expressed by the Commissioner General as to the alleged age of the applicant was based upon a certificate of two surgeons that, after a careful consideration of the physical characteristics, they were of the opinion that 'his age is within one year either way of 23 years.' It is not represented that the certificate was based upon any scientific data, or otherwise than upon the general appearance of the applicant. Upon such a

> question, the opinion of a surgeon is believed to be of no greater value than that of a layman, and in either case it has but little probative value to show a difference of age of only two years. There are circumstances connected with the examination of the applicant which, unexplained, tend to indicate an unfair attitude on the part of the immigration officials."

Likewise, in this case, circumstances are recorded in the record indicating "an unfair attitude on the part of the immigration officials." As already indicated, in the preceding pages, this last Board only saw the applicant while he was being re-examined. No member of it ever saw the voluminous record accumulated before it arrived from Texas, the day before this Board went into its final session. It would seem physically impossible for the different members of the Board to have read and considered this record prior to or during the final examination of this applicant.

For instance, in their Findings, on page 17, setting out the material dates, the Board sweeps them entirely aside with this Finding:

> "It is apparent that these dates were chosen because of the ease with which they could be remembered, and are undoubtedly fictitious."

Such conduct on the part of immigration inspectors was justly criticized and condemned in *Johnson vs. Damon,* 16 Fed. (2d) 65, wherein Judge Anderson observed:

> "As the court below found, the testimony of these four witnesses was consistent on all material points. But the immigration tribunals in effect adjudged the case fraudulent and fabricated—flat perjury.
>
> "Judge Morton, after a careful examination of the evidence, in an unpublished opinion, found that the discrepancies relied upon by the immigration tribunals were 'so slight and insignificant as to afford no basis for a fair-minded tribunal to reach such a conclusion in disregard of the weighty evidence in the applicant's favor.' Examination of the record drives us to the same conclusion.
>
> "This court has by repeated decisions shown its full appreciation of the very narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review the decisions of the immigration tribunals. *Cf. Johnson vs. Kock Shing* (C. C. A.) 3 F. (2d) 889; *Ng Lung vs. Johnson* (C. C. A.) 8 F (2d) 1020. In many cases this court has felt bound to sustain results grounded upon a finding of deliberate perjury, when the evidence in support of so serious a proposition seemed inadequate, if weighed as courts and juries are expected to weigh such evidence. But there is a limit beyond which no fact-finding tribunal can go in finding a case made up out of whole cloth. This seems to us such a case."

The government inspector in Texas, who examined the father and landed brother on two different occa-

sions, on the latter for the special purpose of developing inconsistencies with the previous examination and with the answers given by the applicant, reported with the return of the record, "With the foregoing, it is believed that the primary discrepancies heretofore shown to exist have been accounted for or duly explained." He had the opportunity to see and observe these two important witnesses and he gives them the stamp of approval.

An unverified statement or letter from a clerk of a court of record could not be received in an investigation of this kind.

Barder vs. Zurbrick, 38 Fed. (2nd) 472.

U. S. ex rel Fong On vs. Day, 39 Fed. (2nd) 202, a decision of the U. S. District Court, N. Y., seems to have involved practically the same questions that are presented in this case. There, the Chairman of the Board of Review stated:

> "However, the outstanding adverse feature in this case is the fact that, whereas the applicant claims and is claimed to be twelve years old and cannot be the son of his alleged father if he is above that age, he has been adjudged by the examining medical officer at the port after a physical examination to be not less than sixteen years old. And the full length photograph of the applicant bears out the statement of the Chairman of the Board at the port that the applicant appears

to be nearly twice the age claimed. While estimates of age at other periods may not closely be made with certainty, in the opinion of the board of review it is not possible that a claim could be maintained that an individual who is beyond adolescence and entering upon maturity as attested by a medical officer is of the age of a child approaching puberty.'

And, there, as here, the Board requested the doctor connected with the service to make a statement as to his opinion of the age of the applicant and he replied as follows:

"Re: Chinese Fong Bing Len

"In compliance with the request of the assistant commissioner of immigration, I have this day examined the above named alien and in my opinion he is at least sixteen (16) years of age.

E. H. MULLAN
"Surgeon P.H.S."

And, in considering the statement of the doctor, the judge observed:

"First, that it does not state Dr. Mullan's qualifications, except such presumption thereof as may be involved in the description "Surgeon P.H.S." after his signature; and

Second, that it is a mere statement of a conclusion of fact without a description of the examinations and testimony of which it was based.

"Such an informal certificate may be satisfactory as an intradepartmental memorandum, but it does not satisfy an independent tribunal which is called on to pass on the question whether Fong

Bing Len had a fair trial on the issue of his paternity.

"I do not think that the certificate constitutes adequate evidence in the report to support the department's finding on what it states is a crucial question here involved. *Cf. United States ex rel Devenuto vs. Curran* (C. C. A.) 299 F. 206, 213.

"(2.) Such evidence, if not taken in question and answer form, should at least be in affidavit form with a statement of deponent's qualifications and of the details on which his conclusions are based.

"The record, therefore, put at its highest, is inconclusive and does not affirmatively show, as it should, that there was a fair trial."

Following this, the judge made further observations in justification of his referring the whole matter of age to a special master to take testimony.

The age of this applicant, seems to be the sole ground upon which the Board based its conclusions. Therefore, the judge's observations, as just quoted, seem very applicable to this case and furnish additional reasons why this applicant has been unjustly and unfairly treated.

As heretofore stated, we have conclusively shown the birth place and the age of this applicant by two competent witnesses. Furthermore, this applicant's brother, only a few years his senior, was regularly admitted from this same port only a year previous to

applicant's hearing. And we feel that the injustice done this applicant, through the mistake of the Special Board of Investigation, should be corrected by directing the issuance of the Writ as prayed for in the lower court.

Respectfully submitted,

S. A. KEENAN,

E. P. DONNELLY,

Attorneys for Appellant.

No. 6172

In the United States Circuit Court of Appeals

For the Ninth Circuit

NG MON TONG,

Appellantt,

vs.

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seatle, Washington,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

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Brief of Appellee

STATEMENT OF THE CASE

The appellant, Ng Mon Tong, is of the Chinese race and claims to have been born in China on a Chinese date equivalent to December 14, 1917. He never resided in the United States. He arrived at the port of Seattle, Washington, on the steamer "President Grant" December 30, 1929, and applied

for admission into the United States as a citizen thereof by virtue of being a foreign-born son of Ng Ngin, a native-born United States citizen. He was denied admission by a Board of Special Inquiry at the Seattle, Washington, Immigration Station, his appeal to the Secretary of Labor was dismissed and his return to China was directed. Thereafter he filed a petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Washington, Northern Division. The case now comes before this Court on appeal from the judgment of the District Court denying said petition.

ARGUMENT

The appellant was denied admission by the Board of Special Inquiry for the reason that his claim to be a son of Ng Ngin had not been satisfactorily established; and for the further reasons that he was an alien not in possession of an unexpired immigration visa, and was an alien ineligible to citizenship coming to the United States in violation of Section 13 (c) of the Immigration Act of 1924.

The American nativity and citizenship of the alleged father, Ng Ngin, were conceded by the immigration officials. Consequently, if the appellant were his blood son, he would be a citizen of the United States

under Section 1993 R. S., and the reasons for his exclusion other than the non-existence of the claimed relationship would have no force or effect. The only question at issue is whether or not, in refusing to concede the claimed relationship, the immigration officials abused the discretion committed to them by statute and rendered a decision which was arbitrary, capricious, and in flagrant disregard of the fundamental principles of justice.

It appears from the records that the alleged father was in China at a time to render his paternity of the appellant possible, *if the appellant were of the age claimed.* A son of the approximate name and age claimed by the appellant has been consistently mentioned by the alleged father, and by the alleged brother, Ng Mon Won, who testified in the present case.

Various discrepancies in the testimony are referred to by the chairman of the Board of Special Inquiry (pp. 98-97 of the record), and by the Board of Review in its memorandum (pp. 114-113). While there is not so much disagreement in the testimony with relation to family history and physical surroundings as exists in some cases, there are several discrepancies which should not exist if the relationship of father and son obtained. It does not appear necessary to

comment further on same here, as they are plainly set forth in detail on the indicated pages of the record.

In their Brief counsel aver that the disagreements in the testimony have no bearing on the issue and that the evidence conclusively establishes the appellant's right to admission into the United States, and that the denial of his application for admission was an arbitrary ruling, unsupported except by the suspicion and prejudice of the members of the Board of Special Inquiry; also that the second examination of the alleged father and brother at Houston, Texas, was obviously for the purpose of developing discrepancies. They also state that, sometime prior to the return of the record of this re-examination: "the special Board of Investigation withdrew from the case, voluntarily, or involuntarily, we cannot say"; also that the fact that the hearing before the second Board of Special Inquiry was begun and completed March 14, 1930, constitutes indisputable evidence that the record was not read and considered by the members of the board at any time, or at all, before the chairman wrote up and signed his findings, and that the members of this new board, having decided to arbitrarily deny the application, the chairman sought out enough of the record to justify, as he imagined, his Conclusions and Findings for the rejection of the appellant; and that

"this circumstance alone justifies the claim that this applicant has not had a fair and unbiased trial by a whole Board of Special Investigation as required by the law." In other words, counsel appear to charge that the members of the Board of Special Inquiry which decided this case were prejudiced against the appellant from the start and rendered their decision without any reference to the evidence. They seem to ignore the fact that all the members of this board were sworn officers of the United States government, and that it was their duty as such to decide this case, as well as any other cases which come before them, according to their best judgment. We see no reason why they should have been prejudiced against this particular Chinaman to such a degree as to lose sight of their duty, nor do we see any justification for the charges to that effect made by counsel, nor do we see any reason why the members of the board did not have ample time to consider all of the evidence, especially in view of the fact that their examination of March 14, 1930, covers only four pages of the record. The personnel of the second board (which decided the case) is explained by the statement at the head of the hearing, that none of the members of the first board were available, and there is no justification whatever for the statement of counsel that they "withdrew from the case."

We are unable to see any merit whatever in the statements and reasoning of counsel, in their Brief, regarding the appellant's age, especially in their conclusion that he was between fourteen and fifteen years of age at the time he was examined by the Board of Special Inquiry and Dr. Bailey (p. 13), and their statement (p. 14) that the actual age of appellant is not so material. The appellant's birth is claimed to have taken place in Haw Ju Village, China, C. R. 6-11-1, which is equivalent to December 14, 1917, and, inasmuch as the alleged father's departure for China did not take place until December 22, 1916, (San Francisco 25223/3-24), it would be impossible for the appellant to be appreciably older than is stated, and be his son.

According to the claimed date of his birth the appellant was less than one month over twelve years of age when he was examined by the first Board of SpecialInquiry and the Medical Examiner of Aliens, Dr. A. R. Bailey (January 6, 1930), and was twelve years and three months old on the date on which the members of the second Board of Special Inquiry expressed their opinions as to his age (March 14, 1930).

Page 7 of the record consists of the certificate of A. R. Bailey, A. A. Surgeon, U. S. Public Health Service, to the effect that, judging from appellant's *gen-*

eral appearance, teeth and sexual development, he was of the opinion that the appellant was *between seventeen and twenty-two.*

The opinions of the members of the Board of Special Inquiry are set forth on page 102 of the record as follows:

"Inspector Matterson:

"From the height and general appearance of applicant, his manner of testifying, and the fact that his voice is heavy like a boy who has passed the age of puberty, I believe him to be between seventeen and twenty years of age American reckoning."

"Clerk Miller:

"I would estimate him to be not less than sixteen years of age by American reckoning, and not more than twenty years."

"Chairman:

"Judging from the general appearance of applicant and his manner of speech, I believe him to be not less than seventeen years of age and not more than twenty-one years of age."

From the foregoing it will be noted that only one member of the Board of Special Inquiry conceded that the appellant could be less than seventeen years of age, which also was Dr. Bailey's minimum estimate, and that two members of the board estimated that he might be as old as twenty, and the chairman that he might be twenty-one, while Dr. Bailey conceded that he might be twenty-two.

Counsel contend that these opinions are not admissible as evidence and refer to Dr. Bailey's certificate as an *ex parte* statement, because Dr. Bailey was not present at the hearing before the Board of Special Inquiry. The doctor's certificate shows that he examined the appellant and the grounds on which he based his estimate, and we are unable to conceive what bearing his presence at or absence from the Board of Special Inquiry hearing could have on his opinion.

Immigration officials are not restricted in reception of evidence to such as meets the requirements of legal proof, but can receive and determine the questions before them upon any evidence that seems to them worthy of credit:

> *Johnson v. Kock Shing*, 3 F (2d) 889 (CCA 1);
>
> Certiorari denied *Kock Shing v. Johnson*, 269 U. S. 558;
>
> *Moy Said Ching v. Tillinghast*, 21 F (2d) 810, 811 (CCA 1);

In *U. S. ex rel Smith v. Curran*, 12 F (2d) 636 (CCA N. Y.), it was held that in proceedings in immigration cases, neither the hearsay, the best evidence, nor any of the common law rules of evidence need be observed.

That this appellant could be only slightly over twelve years of age and still have such general appearance, teeth and sexual development that a physician

of Dr. Bailey's wide experience could conclude that he is at least seventeen, and maybe twenty-two, and such general appearance, quality of voice and manner of testifying that the Board of Special Inquiry could conclude that he might be as old as twenty, is too absurd to be conceivable. In this connection it will be noted (p. 8 of the record), that the appellant testified that he *shaved himself, and that he commenced to shave himself about two years ago.*

That the apparent ages of Chinese applicants for admission into the United States, and estimates by government physicians regarding the ages of such persons, constitute material evidence, has been conceded by the courts in the following cases:

In re *Wong Siu Kay*, No. 10764, D. C. W. D. Wash. (not reported);

In re *Lee Suey Ning*, No. 11092, D. C. W. D. Wash. (not reported);

In re *Yee Cho Do*, No. 12150, D. C. W. D. Wash. (not reported);

In re *Jee Ling Quong*, No. 20337, D. C. W. D. Wash. (not reported);

U. S. ex rel Soo Hoo Hong v. Tod (CCA 2), 290 F 689;

Wong Fook Ngoey v. Nagle (this court), 300 F 323;

Fong Lim v. Nagle (this court), 2 F)2d) 971;

Yung Fat v. Nagle (this court), 3 F (2d) 439;

Tom Him v. Nagle (this court), 27 F (2d) 885;

Lew Git Cheung v. Nagle (this court), 35 F. (2d) 452.

In the case of *Woo Hoo v. White*, cited by counsel, the appellant claimed to be twenty years of age, and the certificate of two surgeons was to the effect that in their opinion he was within one year either way of twenty-three. This opinion was not based on any scientific data or otherwise than on appellant's general appearance.

In the case of *Johnson v. Damon* the excluding decision of the immigration officials was based solely on discrepancies in the testimony, which the court did not consider of sufficient importance to constitute substantial evidence against the appellant's claim.

In the case of *Brader v. Zurbrick*, it was held that an *ex parte* and unverified statement by the Clerk of the Superior Court at Michigan City, Indiana, that a search of the records of said court failed to show any record of naturalization papers having been issued to the said Louis Brader or his father, was not evidence. The court evidently erred in holding that Brader's status regarding citizenship had any effect upon the appellant's status, as the marriage did not

take place until 1923—if the date is correctly reported.

The present case differs from that of *Woo Hoo v. White, supra*, in that the disparity between the claimed and apparent age of the appellant is much wider in the present case, and also in the fact that it is much easier to judge whether a person is twelve years old or from seventeen to twenty-two than it is to judge whether he is twenty or twenty-three. The opinion of Dr. Bailey in the present case is also founded on scientific data. Such certificates as the present one have always been recognized in this court. We are unable to see in what manner the cases of *Johnson v. Damon* and *Brader v. Zurbrick* have bearing on the present case.

In *U. S. ex rel Fong On v. Day*, cited by counsel, the District Court took exception to the certificate of Surgeon E. L. Mullan, Public Health Service, because it did not state Dr. Mullan's "qualifications" and because the said certificate was a "mere statement of a conclusion of fact withuot a description of the examinations or tests on which it was based." In that case the applicant claimed to be twelve years old and the certificate of the surgeon was to the effect that, in his opinion the applicant was at least sixteen. The court also appeared to be of the opinion that, if the surgeon's statement were not taken in question and

answer form, it should be in affidavit form, with a statement of deponent's qualifications and the details on which his conclusions were based. There does not appear to be anything in the report of this case to indicate the individual opinions of the members of the Board of Special Inquiry as to the applicant's age. We are unable to see by what process of reasoning the decision in this case, by one District Judge, could be considered as controlling the decision of this court. It is also noted that, instead of sustaining or dischargingthe writ, the District Court ordered the case referred to a Special Master to take proof and make report to the said District Court.

Section 23 of the Immigration Act of 1924 (43 Stat. L. Ch. 190, p. 153) places the burden of proof upon applicants for admission into the United States, and this doctrine has been uniformly upheld by the courts.

Rule 10, Subdivision 3, of the Chinese Rules of the Department of Labor of October 1, 1926, provides as follows:

"In every application for entry as the child of a citizen there shall be exacted convincing proof of relationship asserted as the basis for admission. * * *"

Section 17 of the Act of February 5, 1917 (39 Stat. L. 874) provides:

"* * * In every case where an alien is excluded from admission into the United States under any law or

treaty now existing or hereafter made, the decision of a Board of Special Inquiry shall be final unless reversed on appeal to the Secretary of Labor. * * *"

In the case of *Chin Share Nging v. Nagle* (CCA 9), 27 F (2) 848, the court said:

"* * * The conclusions of administrative officers upon issue of fact are invulnerable in the courts, unless it can be said that they could not reasonably have been reached by a fair-minded man, and hence are arbitrary. * * *"

On collateral review of deportation proceedings in habeas corpus, it is sufficient if some evidence supported the order, in the absence of flagrant error:

> *U. S. ex rel Vajtauer v. Commissioner of Immigration*, 273 U. S. 103.

Unless it affirmatively appears that the executive officers have acted in some unlawful or improper way, and abused their discretion, their finding upon a question of fact must be regarded as conclusive, and is not subject to review by the courts:

> *U. S. ex rel Leong Ding v. Brough* (CCA 2), 22 F. (2d) 926;
>
> *United States v. Ju Toy*, U. S. 253, 49 L. Ed. 1040;
>
> *Chin Yow v. United States*, 208 U. S. 8, 52 L. Ed. 369;
>
> *Low Wah Suey v. Backus*, 225 U. S. 460.

In the case of *Gung You v. Nagle*, 34 F. (2d) 848, this Court said, at page 851:

"* * * The present statement of the rule is that the courts will only interfere in such plain cases of flagrant disregard of fundamental principles of justice as constitute a denial of due process of law."

"The courts are powerless to interfere with conclusions of the immigration authorities and can only deal with cases where the principles of justice have been flagrantly outraged. * * *"

CONCLUSION

The appellant was accorded a fair hearing by the immigration officials and failed to sustain the burden which was upon him to establish his claim. The evidence did not constitute convincing proof that the appellant is the son of his alleged father, and was not of such a nature as to require, as a matter of law, a favorable finding in that respect. The discrepancies in the testimony and the apparent age of the appellant constitute evidence upon which the immigration officials could reasonably arrive at their excluding decision. The said officials did not abuse the discretion committed to them by statute, and their excluding decision was not arbitrary, or capricious, or in contravention of any rule of law, or in conflict with any principle of justice; *hence it is final.* The District

Court did not commit error in denying the writ of habeas corpus, and its decision should be *affirmed.*

Respectfully submitted,

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